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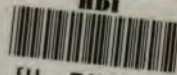
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**THE LAW OF EASEMENTS,
NATURAL RIGHTS ARISING FROM
SITUATION, AND LICENSES, IN INDIA.**

India. Laws, statutes, etc Property law

THE LAW
OF
EASEMENTS,
NATURAL RIGHTS ARISING
FROM SITUATION,
AND
LICENSES,
IN INDIA.

BY
R. B. MICHELL, M.A.,
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SECOND EDITION.

³
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PREFACE TO THIS EDITION.

THIS book has undergone a careful revision by the author, and the cases, Indian and English, reported since the issue of the first edition have been worked into it. The number of these cases, and the importance of many of them, have necessitated considerable additions being made to the notes, and in consequence of this and of the revision the size of the present edition is about double that of the first.

Notes of two cases in Reports published after the body of the book was printed will be found in the Addenda.

The following is taken from the Preface to the first edition :—

From the fact that in those parts of British India to which the Easements Act had not been extended the law relating to easements was mainly the same as the law of England relating thereto, and from the fact that the Easements Act was, in the main, a codification of the English law on the subject of easements and profits *à prendre* appurtenant,^(a) it appeared to me, even before the recent extension of that Act to the Bombay Presidency, the North Western Provinces, and Oudh, that the best form of dealing with the subject, in a book, was by way of a commentary on the Easements Act, referring under the appropriate sections respectively to such differences as existed between the law of the Act and the law obtaining in those parts of British India to which the Act did not apply, as shewn by reported decisions. The recent

(a) Dr. Whitley Stokes, by whom the Act was drawn, says : "The Act is mainly based on the law of England, which, being just, equitable, and almost free from local peculiarities, had, in many cases, been held to regulate the subject in India." —(1 Anglo-Indian Codes, 879).

extension of the Act to the Bombay Presidency, the North Western Provinces, and Oudh, by Act VIII of 1891, has added very largely to the grounds for adopting this course.

* * * * *

The following Acts and portions of Acts have been printed as Appendixes: Act VIII of 1891, which extends the Easements Act to the Bombay Presidency, the North Western Provinces, and Oudh; those portions of the Limitation Act XV of 1877 which relate to easements and are still in force in Bengal and those other parts of British India to which the Easements Act has not yet been extended; the portions of Acts IX of 1871 and XIV of 1859 relating to easements; the English Prescription Act, 2 & 3 Will. IV, c: 71; and Section 147 of the Indian Code of Criminal Procedure, which relates to disputes concerning claims to easements.

Sections 52—57 of the Specific Relief Act, to the provisions of which the discretionary jurisdiction to grant or refuse injunctions restraining disturbances of easements is made subject by section 35 of the Easements Act, are printed as an additional Appendix in this edition.

R. B. M.

MADRAS, *April*, 1898.

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A. & E.	- - - -	- Adolphus and Ellis.
And.	- - - -	- Anderson.
Appx.	- - - -	- Appendix.
B. & Ad.	- - - -	- Barnewall and Adolphus.
B. & Ald.	- - - -	- Barnewall and Alderson.
B. & C.	- - - -	- Barnewall and Cresswell.
B. & P.	- - - -	- Bosanquet and Puller.
B. & S.	- - - -	- Best and Smith.
Beav.	- - - -	- Beavan.
Beng. L. R.	- - - -	- Bengal Law Reports.
————	A. C.	-, Appellate, Civil.
————	O. C.	-, Original, Civil.
————	, O. J.	-, Original Jurisdiction.
Bing.	- - - -	- Bingham.
———	N. C.	- Bingham, New Cases.
Bl., H.	- - - -	- H. Blackstone.
Bom. H. C. R.	- - - -	- Bombay High Court Reports.
————	, A. C.	-, Appellate, Civil.
————	, O. C.	-, Original, Civil.
————	, O. J.	-, Original Jurisdiction.
Br. & Bing.	- - - -	- Broderip and Bingham.
Bro. C. C.	- - - -	- Brown's Chancery Cases.
Bull. N. P.	- - - -	- Buller's Nisi Prius, Law of.
Burr.	- - - -	- Burrow.
C. & M.	- - - -	- Crompton and Meeson.
C. & P.	- - - -	- Carrington and Payne.
Camp.	- - - -	- Campbell.
C. B.	- - - -	- Common Bench Reports (by Manning, Granger and Scott).

- C. B., N. S. - - - - Common Bench Reports, New Series, (by J. Scott).
- C. M. & R. - - - - Crompton, Meeson, and Roscoe.
- Co. - - - - }
Coke - - - - } Coke's Reports.
- Co. Lit. - - - - - Coke on Littleton (1 Inst.).
- Com. Dig. - - - - - Comyns' Digest.
- Cro. Eliz. - - - - - Croke's Reports (cases during reign of Elizabeth).
- Jac. - - - - - Croke's Reports (cases during reign of James I).
- De G., F. & J. - - - - De Gex, Fisher and Jones.
- De G., J. & S. - - - - De Gex, Jones and Smith.
- Dig. - - - - - Justinian's Digest.
- Dr. & Sm. - - - - - Drewry and Smale.
- E. & B. - - - - - Ellis and Blackburn.
- E. B. & E. - - - - - Ellis, Blackburn and Ellis.
- E. & E. - - - - - Ellis and Ellis.
- Ex. - - - - - }
Exch. - - - - - } Exchequer Reports (by Welsby, Hurlstone and Gordon).
- F. & F. - - - - - Foster and Finlason.
- Giff. - - - - - Giffard.
- Hag. Con. - - - - - Haggard (Consistory).
- H. & C. - - - - - Hurlstone and Coltman.
- H. & N. - - - - - Hurlstone and Norman.
- H. L. C. - - - - - Clark and Finnelly's House of Lords Cases.
- Hob. - - - - - Hobart.
- Hyde. - - - - - Hyde (Sir Edward)'s notes of cases, Supreme Court, Calcutta.
- I. L. R., All. - - - - Indian Law Reports, Allahabad Series.
- Bom. - - - - " " Bombay "
- Cal. - - - - " " Calcutta "
- Mad. - - - - " " Madras "
- I. R., C. L. - - - - - Irish Reports, Common Law.
- Ir. - - - - - Irish Reports.

J. & H.	- - - -	Johnson and Hemming.
John.	- - - -	Johnson.
K. & J.	- - - -	Kay and Johnson.
Ld. Raym.	- - - -	Lord Raymond.
L. J., Ch.	- - - -	Law Journal, Chancery.
— C. P.	- - - -	Common Pleas.
— Ex. (or Exch.)	- - - -	Exchequer.
— K. B.	- - - -	King's Bench.
— Q. B.	- - - -	Queen's Bench.
L. R., Ap. Ca.	- - - -	Law Reports, Appeal Cases.
— Ch.	- - - -	Chancery Appeal Cases.
— Ch. Ap.	- - - -	Chancery Appeals.
— Ch. D.	- - - -	Chancery Division.
— C. P.	- - - -	Common Pleas Cases.
— C. P. D.	- - - -	Common Pleas Division.
— E. & I. App.	- - - -	English and Irish Appeals.
— Eq.	- - - -	Equity Cases.
— { Ex. - - - }	- - - -	Exchequer Cases.
— { Ex. - - - }	- - - -	Exchequer Division.
— H. L.	- - - -	English and Irish Appeal Cases, House of Lords.
— H. L., Sc.	- - - -	Scotch and Divorce Appeal Cases, House of Lords.
— I. A.	- - - -	Indian Appeals.
— Q. B.	- - - -	Queen's Bench.
— Q. B. D.	- - - -	Queen's Bench Division.
— Sc. & Div. App.	- - - -	Scotch and Divorce Appeal Cases, House of Lords.
— W. N.	- - - -	Weekly Notes.
L. T.	- - - -	Law Times Reports.
Leon.	- - - -	Leonard.
Lev.	- - - -	Levinz.
M. & G.	- - - -	Macnaghten and Gordon.
M. & S.	- - - -	Maule and Selwyn.
M. & W.	- - - -	Meeson and Welsby.
Macq.	- - - -	Macqueen's House of Lords, Cases.
M. H. C. R.	- - - -	} Madras High Court Reports.
Mad. H. C. R.	- - - -	

Mad. L. J.	- - - -	Madras Law Journal.
Moo. & R.	- - - }	Moody and Robinson.
Mood. & Rob.	- - - }	
Moore, P. C.	- - -	Moore's Privy Council Cases.
Myl. & K.	- - -	Mylne and Keene.
N. S.	- - - -	New Series. [ports.
N. W. P. H. C. R.	- - -	North-West Provinces High Court Re-
Pal.	- - - -	Palmer.
Peake, Ad. Ca.	- - -	Peake's Additional Cases.
Phillim.	- - - -	Phillimore.
Plowd.	- - - -	Flowden.
Poph.	- - - -	Popham.
Q. B.	- - - -	Adolphus and Ellis's Queen's Bench Re- ports, New Series.
Railw. Cas.	- - - -	Railway Cases.
Rep.	- - - -	Coke's Reports.
R. R.	} - - -	Revised Reports.
Rev. Rep.		
Salk.	- - - -	Salkeld.
Saund.	- - - -	Saunders.
Say.	- - - -	Sayer.
Sim.	- - - -	Simons.
Steph. Comm.	- - -	Stephen's Commentaries on the Laws of England.
Sw.	- - - -	Swanston.
S. W. R.	- - - -	Sutherland's Weekly Reporter.
— Civ. R.	- - -	, Civil Rulings.
Taun.	- - - -	Taunton.
T. R.	- - - -	Term Reports (by Durnford and East).
Times L. R.	- - - -	"Times, The", Law Reports.
Vaugh.	- - - -	Vaughan.
Ves.	- - - -	Vesey, senior.
Ves. Jr.	- - - -	Vesey, junior.
Wils.	- - - -	Wilson.
Wms. Saund.	- - -	Williams's Edition of Saunders's Reports.
W. R.	- - - -	Weekly Reporter (English).
Y. & C.	- - - -	Younge and Collyer.

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ADDENDA.

Page 33.—In the note on *Illustrations* (h) and (j) to Sec. 7, next after the words “circumstances respectively of each case,” insert the following:—In *Debi Pershad Singh v. Joynath Singh*, I. L. R., 24 Cal. 865, the Judicial Committee said, in their judgment (at p. 874):—“The right claimed by the appellants . . . is neither more nor less than a right on the part of an upper proprietor to dam back a river running through his land, and to impound as much of its water as he may find convenient for the purposes of irrigation, leaving only the surplus, if any, for the use of proprietors below. In the absence of a right acquired by contract with the lower heritors, or by prescriptive use, the law concedes no such right. The common law right of a proprietor, in the position of the appellants, is to take and use, for the purpose of irrigation, so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below, and without impairing its quality. What quantity of water can be abstracted and consumed, without infringing that essential condition, must in all cases be a question of circumstances, depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume.” And (at p. 887): “The legal right of the lower riparian owners is to have the water of the stream transmitted to them continuously and without interruption, and without any substantial diminution in volume, their right being only subject to the qualification that an upper proprietor may, for purposes which the law regards as legitimate, withdraw from the stream, as it passes along his lands, so much of its stream as will not materially affect its downward flow, or impair their uses of it.”

Page.

163, footnote (3).

add “And see *Palaniandi Tevan v. Puthirangonda Nadan*, I. L. R., 20 Mad. 389, 391; *Channanam Pillay v. Manu Puttur*, 1 Mad. L. J., 47.”

164, footnote (1).

add *Palaniandi Tevan v. Puthirangonda Nadan*, I. L. R., 20 Mad. 389, 390.

169, footnote (6).

add “And see *Palaniandi Tevan v. Puthirangonda Nadan*, I. L. R., 20 Mad. 389; *Channanam Pillay v. Manu Puttur*, 1 Mad. L. J., 47.”

CORRIGENDA.

Page

6, line 2.

for Accordingly *read* Accordingly.

13, line 8.

for Ho *read* He.

15, footnote(2).

for Abudr *read* Abdur.

46, footnote(5).

for Act I of 1868, s. 2,(5), *read* Act X of 1897, s. 3, (25).

75, line 29.

for Guyford *read* Gayford.

77, line 18.

for realing *read* ruling.

140, footnote(4).

for Aynsely *read* Aynsley.

165, line 22.

for Ambatlal *read* Amratlal.

171, line 14.

for is it *read* it is.

279, line 10.

for Art. 135 *read* Art. 145.

THE INDIAN EASEMENTS ACT, 1882.

C O N T E N T S.

PREAMBLE.

PRELIMINARY.

SECTIONS.

1. Short title.
Local extent.
Commencement.
2. Savings.
3. Repeal of Act XV of 1877, Sections 26 and 27.

CHAPTER I.

OF EASEMENTS GENERALLY.

4. "Easement" defined.
Dominant and servient heritages and owners.
5. Continuous and discontinuous, apparent and non-apparent, easements.
6. Easement for limited time or on condition.
7. Easements restrictive of certain rights.
 - (a) Exclusive right to enjoy.
 - (b) Rights to advantages arising from situation.

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THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS.

8. Who may impose easements.
9. Servient owners.
10. Lessor and mortgagor.

SECTIONS.

11. Lessee.
12. Who may acquire easements.
13. Easements of necessity and *quasi*-easements.
14. Direction of way of necessity.
15. Acquisition by prescription.
16. Exclusion in favor of reversioner of servient heritage.
17. Rights which cannot be acquired by prescription.
18. Customary easements.
19. Transfer of dominant heritage passes easement.

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THE INCIDENTS OF EASEMENTS.

20. Rules controlled by contract or title.
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21. Bar to use unconnected with enjoyment.
22. Exercise of easement.
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24. Right to do acts to secure enjoyment.
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25. Liability for expenses necessary for preservation of easement.
26. Liability for damage from want of repair.
27. Servient owner not bound to do anything.
28. Extent of easements.
Easement of necessity.
Other easements—
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 - (b) right to light or air acquired by grant ;
 - (c) prescriptive right to light or air ;
 - (d) prescriptive right to pollute air and water ;
 - (e) Other prescriptive rights.
29. Increase of easement.
30. Partition of dominant heritage.
31. Obstruction in case of excessive user.

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THE DISTURBANCE OF EASEMENTS.

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33. Suit for disturbance of easement.
34. When cause of action arises for removal of support.
35. Injunction to restrain disturbance.
36. Abatement of obstruction of easement.

CHAPTER V.

THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS.

37. Extinction by dissolution of right of servient owner.
38. Extinction by release.
39. Extinction by revocation.
40. Extinction on expiration of limited period or happening of dissolving condition.
41. Extinction on termination of necessity.
42. Extinction of useless easement.
43. Extinction by permanent change in dominant heritage.
44. Extinction on permanent alteration of servient heritage by superior force.
45. Extinction by destruction of either heritage.
46. Extinction by unity of ownership.
47. Extinction by non-enjoyment.
48. Extinction of accessory rights.
49. Suspension of easement.
50. Servient owner not entitled to require continuance.
Compensation for damage caused by extinguishment.
51. Revival of easements.

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LICENSES.

52. "License" defined.
53. Who may grant license.
54. Grant may be express or implied.

d

SECTIONS.

- 55. Accessory licenses annexed by law.
 - 56. License when transferable.
 - 57. Grantor's duty to disclose defects.
 - 58. Grantor's duty not to render property unsafe.
 - 59. Grantor's transferee not bound by license.
 - 60. License when revocable.
 - 61. Revocation express or implied.
 - 62. License when deemed revoked.
 - 63. Licensee's rights on revocation.
 - 64. Licensee's rights on eviction.
-

THE
INDIAN EASEMENTS ACT,
ACT No. V OF 1882.

~~~~~  
(AMENDED BY ACT XII OF 1891.)

*An Act to define and amend the law relating to  
Easements and Licenses.*

~~~~~

WHEREAS it is expedient to define and amend the law relating to Easements and Licenses; It is hereby enacted as follows:— Preamble.

PRELIMINARY.

1. This Act may be called “The Indian Easements Act, 1882:” Short title.

It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg; Local extent.

and it shall come into force on the first day of July, 1882. Commence-
ment.

Commentary.

By Act VIII of 1891⁽¹⁾, which was passed on 6th March 1891, the Easements Act was extended to the Bombay Presidency, the North-West Provinces and Oudh. But such extension did not affect rights existing before the extending Act came into force ⁽²⁾.

(1) See Appendix 1.

(2) Udit Singh v. Kashi Ram, I.L.R. 14 All., 185.

Savings.

2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from—

(a) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

(b) any customary or other right (not being a license) in or over immoveable property which the Government, the public or any person may possess irrespective of other immoveable property; or

(c) any right acquired, or arising out of a relation created, before this Act comes into force.

Repeal of Act
XV of 1877,
sections 26 and
27.

3. Sections 26 and 27 of the Indian Limitation Act, 1877, and the definition of "easement" contained in that Act, are repealed in the territories to which this Act extends. All references in any Act or Regulation to the said sections, or to sections 27 and 28 of Act No. IX of 1871, shall, in such territories, be read as made to sections fifteen and sixteen of this Act.

CHAPTER I.

OF EASEMENTS GENERALLY.

"Easement"
defined.

4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Dominant and
servient heri-
tages and
owners.

Explanation.—In the first and second clauses of this section, the expression “land” includes also things permanently attached to the earth: the expression “beneficial enjoyment” includes also possible convenience, remote advantage, and even a mere amenity; and the expression “to do something” includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.

Illustrations.

(a) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(b) A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household out of a spring therein. This is an easement.

(c) A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.

(d) A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.

(e) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(f) A is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.

Commentary.

The definition of 'Easement' given in this section is such as to cover rights *ex jure naturæ*, or natural rights, *in alieno solo* (i. e., the rights referred to in para. (b) of s. 7) as well as easements. The only difference between those natural rights and easements lies in the modes in which they originate, natural rights arising from the mere situation of a tenement, easements arising from the act of man.⁽¹⁾ To render the definition in this section applicable to easements *only*, and not to "Natural rights" *also*, words to the effect that the right originates by the act of man, or that it originates by grant, covenant operating as grant, prescription, custom, or legislative enactment, should be inserted.

The Indian Legislature has extended the meaning of the term 'easement' so as to include, besides those rights to which that term is applied in English law, those rights which in that law are termed '*profits à prendre*' appurtenant (i. e., *profits à prendre* annexed to the ownership of immoveable property). An 'easement,' in English law, is a right to some convenience, privilege, or advantage enjoyable in or over, or derivable from, the servient tenement, and not involving the taking of any portion of the substance or produce of such tenement; a *profit à prendre* is a right to take some portion of such substance or produce. In Act XV of 1877 'easement' was defined as including "also" *profits à prendre*; (2) and while the definition is repealed, in the territories to which this Act extends, by this Act,⁽³⁾ *profits à prendre* appurtenant

(1) See *per James, L. J.*, in *Corporation of Birmingham v. Allen*, L. R. 6 Ch. D. at p. 292.

(2) See Appendix IV.

(3) S. 3.

are expressly brought within the meaning of positive easements by the *Explanation* to this section. Instances of *profits à prendre* are given in *Illustration (d)* to this section, and other instances are rights to take stones, or sand, or ore, or turf, from the servient tenement. (1) A right to take water from a lake or river on the servient land is not a *profit à prendre* but an easement in the English sense of the word, because such water is not the property of the servient owner, water being an object of property only when enclosed in some vessel. (2) It was held in *Chunder Churn Roy v. Shib Chunder Mundal* (3) that a right of fishery in gross or any other *profit à prendre* in gross could be acquired under Act XV of 1877 (Secs. 3 & 26). Act IX of 1871 contained no such definition as that in Sec. 3 of the Act of 1877, extending the term 'easement' so as to comprehend '*profits à prendre*'; and a right of fishery (*julkur*), as well as any other *profit à prendre*, was held not to be an easement within the meaning of Sec. 27 of the former Act (corresponding with Sec. 26 of Act XV. of 1877). (4)

An easement must always be attached to the ownership or occupation of some immoveable property for the better enjoyment of that property. A right, in other respects similar to an easement, but not thus held in connection with some immoveable property, may exist, but it is not an easement. Such a right is a mere personal right, like the personal servitudes of the Roman law; and though the term "easement in gross" has been applied to such a right, the term is, strictly speaking, a misnomer. (5) It being an essential quality of easements that they are annexed or appurtenant to the ownership or occupation of some immoveable property, it follows from, or rather is involved in, this, that an easement cannot be severed from the tenement to which it is attached,

'which the owner... for the beneficial enjoyment of that land.'

(1) *Bailey v. Appleyard*, 8 A. & E., 161; *Constable v. Nicholson*, 14 O. B., N. S. 230; *Bailey v. Stevens*, 12 C. B., N. S., 91.

(2) *Manning v. Wasdale*, 5 A. & E. 758; *Race v. Ward*, 4 E. & B. 702.

(3) I. L. R., 5 Cal. 945.

(4) *Parbutty Nath Roy Chowdhry v. Madho Paroe*, I. L. R., 3 Cal. 276.

(5) *Rangley v. Midland Ry. Co.*, L. R., 3 Ch. App. 306.

so as to have a separate and independent existence,⁽¹⁾ Accordingly in the section of the Transfer Property Act,⁽²⁾ which specifies what property is inalienable, it is enacted that "an easement cannot be transferred apart from the dominant heritage."

Nor can an easement be successfully claimed in respect of property which does not admit of such beneficial enjoyment as that easement involves. Thus a *profit à prendre* consisting of a right of common for cattle *levant* and *couchant* cannot be claimed as appurtenant to a house without any curtilage or land.⁽³⁾

It is not quite clear whether "owner" here means absolute owner or includes also persons having limited estates or interests. In s. 46 the term "absolute ownership" is used, implying that ownership may sometimes be limited ownership; but in Illustrations (a), (b), (c), (d), (e) to that section the word "owner" is evidently used as meaning absolute owner. In s. 12 "owner" would seem to be used in the sense of absolute owner. Here (in the first paragraph of s. 4), however, it may be thought that "owner" is meant to include holders of other interests besides absolute ownership, because a person having a limited interest in a tenement—e. g., a tenant for life or a lessee for a term of years—can (whether he is in occupation or not) acquire by grant (or by covenant) an easement for the beneficial enjoyment of such tenement, limited in duration.⁽⁴⁾ The terms "owner" and "ownership" are used in different senses—sometimes as meaning absolute ownership, or, in the case of the English law, tenure in fee simple, but sometimes in a sense which includes also rights of property for limited estates or interests. To take an instance of the latter use, in *Simper v. Foley*⁽⁵⁾ the Vice-Chancellor in his judgment says: "It is true by

(1) See *Ackroyd v. Smith*, 10 C. B. 164.

(2) Sec. 6.

(3) *Scholes v. Hargreaves*, 2 Rev. Rep. 532; 5 T. R. 46; *Benson v. Chester* 4 Rev. Rep. 708; 8 T. R. 396.

(4) See ss. 6 and 12, and notes thereto.

(5) 2 John. and Hem. 555, at p. 563.

the deed of 1837 the dominant and servient tenements were united in the same ownership, as to the one in fee, as to the other for a term." In view of this ambiguity of the term, and of the importance of precision of meaning in using the term in the Act (especially in certain portions of the subject, such as those dealt with in s. 12, which relates to the question by whom easements are acquirable, and in s. 46 and its Illustrations, which relate to "extinction by unity of ownership") it seems to me unfortunate that the Act contains no definition of the term as used in the Act. The terms "dominant owner" and "servient owner" are defined (in this section) as including occupier as well as owner (for brevity and convenience's sake, no doubt); but this definition, of course, applies to the word "owner" only when combined with the words "dominant" and "servient."

An easement must always be attached to the ownership or occupation of *some specific* land or lands, or other immoveable or immoveables; in other words—the words of this section—it is the owner or occupier of "*certain land*," "*as such*," to whom, and to whom only, an easement can belong, "for the beneficial enjoyment of *that land*." Consequently, if the owner of two houses, A, and B, has an easement (*e.g.*, a right of way) in respect of house A, this does not *ipso facto* entitle him to the same easement in respect of house B; even though the two houses may be contiguous.⁽¹⁾ See Sec. 21 and *Illustration (a)* thereto. Nor does the mere fact that a person claiming an easement is the owner or occupier of a tenement, to which, from its situation, that easement is capable of being attached, entitle him to that easement if as a matter of fact the right is not connected with the beneficial enjoyment of that tenement, or is claimed by him for purposes wholly unconnected with that tenement.⁽²⁾

(1) *Ewindon Waterworks Co., Ltd. v. Wilts and Bucks. Canal Co.*, L. R., 7 H.L. App. 697.

(2) *Ackroyd v. Smith*, 10 C. B. 164; *Hill v. Tupper*, 32 L. J., Exch. 217; *Bailey v. Stevens*, 12 C. B., N. S., 91; *Ellis v. Mayor and Corp'n. of Bridgnorth*, 32 L. J., C. P. 278.

"to do . . .
something . . .
or to prevent
something
being done."

In all cases of easements the correlative obligation on the servient owner is of a passive nature; it is never an obligation to do something.⁽¹⁾ Where the easement consists of a right "to do and continue to do" something, the obligation on the servient owner is to suffer or allow that thing to be done by the dominant owner, as in the case of an easement of way, or of discharging water, or taking water, or an easement of any of those kinds which in English law would be *profits à prendre* appurtenant. And where the easement consists of a right "to prevent and continue to prevent something being done," &c., the obligation on the servient owner is to abstain from doing that thing, as in the case of an easement of light, or of air, or of support. See also note to Sec. 5. By covenant or contract, indeed, an owner or occupier of land may be under an obligation to *do* something in or upon or in respect of his land for the benefit of the owner or occupier of other immoveable property, but the correlative right in such a case would not be an easement.⁽²⁾ But it seems to be now settled law in England that, except in the case of a lessee, a covenant imposing on the owner of land an obligation to do something involving expense cannot (as restrictive covenants can) run with the land, *i.e.*, be binding on the assignee of the land as such, and that it does not bind even an assignee who acquired the land with notice of such covenant.⁽³⁾

"something,"

An easement is a right only to make some particular use of, or to have some particular enjoyment over, the servient property; it has been said to be a definite portion or fragment taken or detached from the indefinite right of user of

(1) See section 27.

(2) See *Cooke v. Chilcott*, L. R., 3 Ch. D. 694; *Heywood v. Brunswick Building Society*, L. R., 8 Q. B. D. 403; *London & S. W. Ry. Co. v. Gomm*, L. R., 20 Ch. D. 562. Also see Sec. 20 of this Act. And see *Illust. (f)* to this (4th) section.

(3) *Hall v. Ewin*, L. R., 37 Ch. D. 74; *Austerberry v. Corp'n. of Oldham*, L. R. 29 Ch. D. 750; *Heywood v. Brunswick Permanent Benefit Building Society*, L. R., 8 Q. B. D. 403; *Williams v. Earle*, L. R., 3 Q. B. 739; *Luker v. Dennis*, L. R., 7 Ch. D. 227; *Transfer of Property Act*, s. 40.

the owner of that property.⁽¹⁾ "It may consist either in restraining, for the benefit of the dominant tenement, certain uses which its owner might otherwise make of the servient land," (in which case it is a 'negative' easement), "or in compelling him to submit to uses of that land by others, which are not incompatible with his retaining the right of property,"⁽²⁾ (in which case it is a 'positive' easement). The difference between an interest or right of property in land and an easement has been put to the test in many cases. In *Reilly v. Booth*⁽³⁾, *M* and others were the owners of a house and certain premises in the rear of it. Through the house there was a passage communicating with a street in front of the house and the premises in rear of it. Above this passage were some of the rooms of the house, and under it was a vault belonging to the same persons. They conveyed the premises in the rear of the house together with the passage to *W* in fee. The deed of conveyance after conveying the premises at the back of the house, and referring to the passage by the description of "gateway," proceeded "together with the exclusive use of the said gateway," and then followed a description of the passage by its width, length and height. The Court of Appeal held that *W* was entitled not merely to a right of way through the passage, but to a right to use it in any manner and for any purpose, in fact, as an owner could use it. In his judgment Lopes, L. J., one of the members of the Court, said: "The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to law which gives exclusive and unrestricted use of a piece of land;"⁽⁴⁾ and this dictum was

(1) See Bentham, 1 *Traité de Legislation*, 251; 2 Austin's *Lectures on Jurisprudence* (4th Ed. by Campbell), 832, 843. See also *Dyer v. Lady James Hay*, 1 Macq. 305; *Buszard v. Capel*, 8. B. & C. 141; *Mayor, &c., of Southport v. Ormskirk Union Assessment Committee*, L. R. 1893, 2 Q. B. at p. 473 (*per Cave, J.*).

(2) by Lord Watson in *Metropolitan Railway Co. v. Fowler*, L. R. 1893, App. Cas. 424.

(3) L.R., 44 Ch. D., 12.

(4) L.R., 44 Ch. D. 26.

concurred with by Lord Esher, M. R., and by Lord Ashbourne in *Metropolitan Railway Co. v. Fowler*⁽¹⁾ In *Metropolitan Railway Co. v. Fowler*⁽²⁾ the Act authorizing the construction of the plaintiffs' underground railway empowered them for that purpose to appropriate and use the subsoil and under-surface of any roadway or footway, and under this power they had constructed in the subsoil under a roadway a substantial brick tunnel of the requisite dimensions for the portion of their railway which was to be made through it, and had made such portion, and thereafter had the exclusive use of the tunnel for the purposes of their railway. It was contended that they had only a right of user for the conveyance of passengers and other purposes subsidiary thereto, and therefore only an easement. It was held that under the power given them to "appropriate and use the subsoil" they had acquired, in respect of the tunnel, an interest in land and not merely an easement. This decision was followed in *Farmer v. Waterloo and City Railway Co.*,⁽³⁾ which turned on the meaning of the same words in the special Act under which the defendant Company were incorporated. In *Chelsea Waterworks Co. v. Bowley*⁽⁴⁾, the Company, who were the owners of certain pipes which they had, under statutory powers, laid through the subsoil of certain streets, were held not liable to the land tax in respect of these pipes on the ground that neither the pipes so laid nor the right to lay them could be considered "land or hereditament" within the meaning of the Land Tax Acts, which imposed the tax on bodies corporate having or holding any lands or hereditaments. In *The Queen v. East London Waterworks Co.*⁽⁵⁾ the Company were held, in respect of their pipes laid by them under statutory powers through the subsoil of certain streets, to be "occupiers of land" within the meaning of

(1) L. R., 1892, 1 Q. B. 171; L. R., 1893, A. C. 428.

(2) L. R., 1893, A. C., 416; L. R., 1892, 1 Q. B., 165.

(3) L. R., 1895, 1 Ch. 527.

(4) 17 Q. B., 358.

(5) 18 Q. B., 705.

Stat. 11 Geo. 3, c. 12, and therefore rateable under that Statute. There had been previous decisions to the same effect under Stat. 43 Eliz., c. 2. The decisions in these cases turned upon the construction of the terms of the respective Statutes applying to them, and the decision in *Chelsea Waterworks Co. v. Bowley* appears not irreconcilable with the decision in *The Queen v. East London Waterworks Co.* and the decisions under 43 Eliz., c. 2: in *Chelsea Waterworks Co. v. Bowley*, the Court said "Land, like the word 'inhabitant', which likewise occurs in Stat. 43 Eliz., c. 2, has various meanings; and it may, in that Statute passed to throw a charge upon the occupier, mean the ground on which a chattel is deposited in the exercise of an easement, although in other Acts of Parliament it means a legal interest in the soil. This is the meaning which we think it bears in the Land Tax Acts:" see also the judgment of Campbell, C. J., in *The Queen v. East London Waterworks Co.*⁽¹⁾ In *Mayor, &c., of Southport v. Ormskirk Union Assessment Committee*⁽²⁾ the local board of a township under an Act had the exclusive right of laying gas-pipes within the township, and were bound to keep them in good repair, and to allow the appellant Corporation the use of the pipes for the supply of gas for public and private purposes within the township, in consideration of certain payments to be made quarterly therefor. It was held that the Corporation in respect of their right of use of the pipes had only an easement, and were not "occupiers" of the pipes or the land, and were therefore not liable to be rated as such occupiers. In *East London Waterworks Co. v. Trustees for Mile End Old Town*⁽³⁾ the Water Company were held not to be rateable in respect of their pipes under a local Act, because the rating Section did not contain the word "land," but imposed the rate on the occupiers of "messuages, tenements, coach-houses"

(1) 18 Q. B., 716.

(2) L. R., 1894, 1 Q. B. 196; 1893, 2 Q. B. 468.

(3) 17 Q. B., 512. The decision in *Rex v. Manchester and Salford Waterworks Co.*, 1 B. & C. 630, was on the same ground.

(and other buildings specifically mentioned) "or other buildings, tenements or hereditaments," and the latter general words following the specific ones were held to comprise only things *eiusdem generis* with those specifically mentioned, *i.e.* only buildings. An exclusive right to a pew in a parochial church or chapel, when annexed to the ownership of a house, is not, by the common law of England, a right of property in the soil constituting the site of the pew, but is in the nature of an easement, being a right to the use of the pew for a particular purpose, *viz.*, for the purpose of attending Divine Service.⁽¹⁾ The freehold property in the soil is ordinarily vested in the parson, but the right to grant an exclusive right to a pew is in the Ordinary⁽²⁾. A person entitled to a several fishery, whether in a portion of the sea between high and low water mark, or in waters of a public navigable river, either tidal or non-tidal, may or may not be the owner also of the soil over which his fishery extends. If there is an instrument of grant of the fishery in existence, the question whether the grantee is so entitled to the soil also, may depend entirely or mainly on the terms of the instrument. If his claim is based on user, from which a grant is presumed, that question will depend upon the evidence as to user.⁽³⁾ But proof of his right to a several fishery raises a presumption that he is also the owner of the soil, capable however of being rebutted by evidence showing the contrary.⁽⁴⁾ And this presumption arises even against the Crown, where the claim, being to the foreshore, is made against the Crown.⁽⁵⁾

"In or upon
... certain
other land not
his own."

Ordinarily, there cannot be an easement, if the ownership,

(1) *Hinde v. Chorlton*, L. R., 2 C. P. 104, 116; *Brumfitt v. Roberts*, L. R., 5 C. P. 224, 232, 233; *Greenway v. Hockin*, L. R. 5 C. P. 235.

(2) *Brumfitt v. Roberts*, L. R., 5 C. P. 232; *Halliday v. Philipps*, L. R., 23 Q. B. D. 53.

(3) *Attorney-General v. Emerson*, L. R., 1891, A. C. 649; *Duke of Somerset v. Fogwell* 5 B. & O. 875.

(4) *Marshall v. Ulleswater Steam Nav. Co.*, 3 B. & S. 746; *Holford v. Bailey*, 8 Q. B., 1000; 13 Q. B., 426; *Attorney-General v. Emerson*, L. R., 1891, A. C. 649; *Hindson v. Ashby* L. R., 1896, 2 Ch. 1, 11.

(5) *Attorney-General v. Emerson*, L. R., 1891, A. C. 649

by which I here mean the absolute ownership of the two tenements, the dominant and the servient (or, rather, the quasi-dominant and the quasi-servient) tenement, is vested in the same person, for that would involve the absurdity of a person having an easement against himself. The enjoyment over the subservient tenement which the owner of the benefited tenement has in such case is had by him by virtue of his right of proprietorship in the former tenement. He could himself, by virtue of that right of property, obstruct or render impossible such enjoyment. He is simply subordinating one part of his property to another part for the more beneficial enjoyment of the latter. Hence, where an easement exists, if the absolute ownership of both the dominant and the servient tenement become united in one person the easement is, ordinarily at least, extinguished:(1) thereupon that which was previously enjoyed as an easement, is (if it is continued to be enjoyed) enjoyed by virtue of the right of proprietorship. So, in the English law, the fee simple of the dominant and servient tenements must, ordinarily, be in different persons. But a tenant can have an easement against his landlord by grant from the latter, and a tenant can acquire an easement of light against his landlord under the English Prescription Act, and under the Easements Act it is possible for a tenant to acquire by prescription an easement of light or air or support against his landlord.(2) In these cases an easement exists, though the absolute ownership, or (in the English case) the fee simple, of both the dominant and the servient tenements belongs to the same person; and in the cases of the tenant acquiring an easement against his landlord by prescription, inasmuch as the easement is acquired as appendant or appurtenant to the dominant tenement and on behalf or in right of the absolute owner or the owner in fee (as the case may be) thereof and against the absolute owner or the owner in fee of the servient tene-

(1) See. S. 46.

(2) See notes to SS. 12 and 15.

ment⁽¹⁾, we have here what look very like cases of an absolute owner, or an owner in fee, of two tenements acquiring an easement in favour of one of them against the other. An easement to divert water from a river was held to have been acquired by custom by tenants of a zemindar, who appear to have been permanent occupancy tenants, entitled to the soil subject to payment of *tirva*, against their landlord.⁽²⁾

Explanation.

The words "possible convenience, remote advantage, and even a mere amenity," all which "the expression 'beneficial enjoyment' includes," are large enough to admit of numerous forms of easements, which the English law does not admit of. For instance, they would certainly include an easement of undisturbed privacy, *i.e.*, a right of an owner (or occupier) of a house to prevent the owner (or occupier) of an adjacent house from opening windows commanding a view into the interior of the former house. In fact, *Illustration (b)* to Sec. 18 shows that the Legislature intended that an easement consisting of such a right of privacy should be acquirable by local custom⁽³⁾ By the English law the

(1) See *Wheaton v. Maple & Co.*, L. E., 1893, 3 Ch. 48, 63, 65; and notes to SS. 12 and 15.

(2) *Orr v. Raman Chetti*, I. L. R., 18 Mad. 320, 321, 327.

(3) Mr. Whitley Stokes in his "Anglo-Indian Codes," Vol. I, p. 881, states that *Illustration (d)* of sec. 5 shows that the Indian Easements Act recognizes a right of privacy. But the right to prevent building, there mentioned, is one which is involved in an easement of light, or an easement of air, and therefore it cannot be inferred from that *Illustration* that a right of privacy is one the existence of which is recognized by the Legislature. Mr. J. D. Mayne, in a review of Mr. Stokes's book (*Asiatic Quarterly Review*, October, 1887, p. 346); in reference to Mr. Whitley Stokes's statement above-mentioned says, after quoting Sec. 5 and its *Illustration (d)*, "Where is there anything in all this about a right of privacy? We are not told how a right can be annexed to A's house so as to prevent B from building on his land. When we turn to section 15, which shows what easements can be obtained by prescription, we find that a free access to light or air may be so obtained. The result of such an easement would be to prevent B erecting any building which would interfere with the right of A. If the right of privacy can be an easement, why can it not be obtained by prescription? and if it can be obtained by prescription, why is it not alluded to in Section 15? . . . It is admitted that, except for the Statute, no right of privacy exists, and with all respect for Mr. Stokes, we venture to think that there is no such right now." Mr. Mayne, however, appears to me to have overlooked, as also does Mr. Stokes, the *Explanation* to section 4, and also *Illustration (b)* to Sec. 18. And see note to Sec. 18, *Illustration (b)*.

existence of such an easement is not allowed. (1) Nor does the Law of India admit of such a right of privacy being acquired by prescription. (2) The words 'mere amenity,' would, apparently, admit of an easement consisting in a right to an unobstructed view or prospect, which also is not among the easements which the law of England recognizes. (3) The expediency of enlarging, at least to any great extent, the power of creating easements may be questioned. The number and kinds of permanent restrictions which by the English law may be imposed, by means of easements, on successive holders of land and houses, in respect of their rights of use and enjoyment of such property, are limited. There are certain easements which that law allows to exist, and no easement other than those can be created. In *Keppel v. Bailey* (4) Lord BROUGHAM said, "There are certain known

(1) See *Turner v. Spooner*, 30 L. J., Ch. 803.

(2) *Komathi v. Gurunada Pillai*, 3 Mad. H. C. R. 141; *Mahomed Abudr Razim v. Birju Sahu*, 5 Beng. L. R. 876; *Shrinivas Udupirav v. Reid*, 9 Bom. H. C. R. 266; *Sayyad Azuf v. Ameerubibi*, 1 L. R. 18 Mad. 163.

(3) *Aldred's case*, 9 Coke, 58; *Atty.-Genl. at relation of Grays Inn Society v. Doughty*, 2 Ves. 453. But a right to prospect may be created by agreement or covenant not to obstruct the prospect (*Piggott v. Stratton*, 1 DeG. F. & J. 33; *Attorney-General v. Doughty*, 2 Ves. sen. 453; *Dalton v. Angus*, L. R., 6 App. a. 824, per Lord BLACKBURN; and see *Komathi v. Gurunada Pillai*, 3 Mad. H. C. R., at p. 143), and such covenant may run with the land (*Western v. Macdermott*, L. R., 1 Eq. 499). PEACOCK, C. J., expressed the opinion that a right of light beyond what was necessary for the reasonable and comfortable use of a house, a right of light for luxury or delight, could be acquired by grant, though not by prescription: *Bagram v. Khettranath Karformah*, 3 Beng. L. R., O. C., 52, 47. A view into a house cannot be the subject of an easement: in the case of shops, taverns, and places of business or of entertainment in towns, an obstruction to the view, through the windows, of articles exposed for sale, or the view of the shop or other building, which would otherwise be open to passers by, may be very prejudicial to the interests of the owner or occupier of the shop or other building, but he cannot acquire an easement to prevent the erection of such obstruction on that account: *Butt v. Imperial Gas Co.*, L. R., 2 Ch. Ap. 158; *Smith v. Owen*, 14 W. R. 422; 35 L. J., Ch. 317. In *Ram Roosh Chowdree v. Deokee Nundun*, 2 N. W. P. H. C. R. 169, it was held that the fact that, by a neighbour, B, building on his land, A's shop would become concealed from the view of traders and his trade be diminished in consequence, did not entitle A to restrain B from so building on his land, unless A had acquired an easement superseding B's natural right so to build. There was no decision in that case on the question whether an easement could be acquired consisting of a right such as that claimed by A in the case.

(4) 2 Myl. & K. 535.

incidents to property and its enjoyment; among others certain burdens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognized by the law. . . . But it must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. . . . Great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands however remote." And in *Leech v. Schweder*,⁽¹⁾ MELLISH, L. J. said, "Where the right comes into existence by covenant, the burthen does not run at law with the servient tenement at all; but a Court of Equity says that a person who takes it with notice that such a covenant has been made, shall be compelled to observe it. That is the ordinary case where there is such a covenant as I before referred to, that a person shall have an uninterrupted view from his drawing-room window, because the law will not allow the owner of land to attach an unusual and unknown covenant to the land, so that a man who buys the property in the market without knowing that it is subject to any such burthen, would find that some previous owner had professed to bind all subsequent owners by an obligation not to obstruct the view which somebody else would have from the windows of his house. In such a case as that, though the man who makes the covenant is liable, yet those claiming under him are not liable at law; but the Court of Equity says that if a purchaser has taken the land with notice of that contract, it is contrary to equity that he should take advantage of that rule of law to violate the covenant. But in the case of a grant of a well-known easement, such as a right to light, or a watercourse, or a right of way, or any of the numerous easements which

(1) L. R., 9 Ch. App., pp. 475, 476.

are well-known to the law, when they are once validly created the right passes at law and the owner and occupier of the dominant tenement may maintain an action against the occupier of the servient tenement, if the right is interfered with; and in all such cases the rule in equity ought to follow the law."

But in *Simpson v Mayor of Godmanchester* (1), in which it was contended that the right claimed by the defendants, for the benefit of their lands, to open in times of flood the sluices of certain river locks belonging to the plaintiff, was not a right which the law recognized as having a possible existence, Lord Herschell, overruling this contention, said; "easements may be of various characters, and it is a fallacy to suppose that every easement must be brought within some particular class which has been recognized, such as the class relating to watercourses or light or air or otherwise. If a right is granted by the owner of land to another person to enter and to do something on the grantor's land for the benefit of the land of that other person, that *prima facie* is an easement." (2)

The English law draws a line between purposes which are necessary, or useful in some way, and purposes of pure pleasure, or as WRAY, C. J., said of a claim to prospect, "matter only of delight." (3) But Lord BLACKBURN, in *Dalton v. Angus* (L. R., 6 App. Ca. at p. 824) said that this ground for the law not allowing an easement of prospect was "to his mind more quaint than satisfactory," and that "a much better reason was given by Lord HARDWICK in *Attorney-General v. Doughty* (2 Ves. Sen. 453) where he observes that if that was the case there could be no big towns."

But, supposing a grant purporting to be a grant of a new species of easement would, by English law, be ineffectual to create such an easement, it holds good in favor of the grantee personally as against the grantor personally. (4)

(1) L. R., 1896, 1 Ch. 214.

(3) *Aldred's case*, 9 Coke 58.

(2) L. R., 1896, 1 Ch. 219.

(4) *Hill v. Tupper*, 2 H. & C. 121, 128.

In *Bagram v. Khettranath Karformah* (1) in which it was held that a right to the south breeze could not be acquired by prescription, Sir BARNES PEACOCK in his judgment observed (but the observations were, no doubt, *obiter*) that "such a right might be acquired by express grant," and that "there are many things from which a man may derive pleasure which may be obtained by express grant, and which cannot be acquired by prescription."

An exclusive right of a riparian proprietor to a private ferry, is, as was remarked by WHITE, J., (2), so far as it involves a right to embark and disembark passengers on the land of the opposite riparian proprietor, an easement; and also, it may be added, so far as it involves a right of way over the sub-soil of the river *usque ad medium filum* which belongs to such opposite proprietor, on his side of the middle line, it is an easement, unless by reason of the ferry being across the tidal portion of the river or on some other ground the public have a right of navigation.

A right of a house-owner to have eaves of his house projecting over land of his neighbour appears, like a right of a man to an upper story of a house, the lower portion of which belongs to another, to be a corporeal right or right to tangible immoveable property, occupying part of the vertical column of space, another part of which belongs to another, rather than an incorporeal right or easement (3)

Continuous and discontinuous, apparent and non-apparent, easements.

5. Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is, or may be, continual without the act of man.

(1) 3 Beng. L. R., O. C. 18, 46, 62.

(2) *Parmeshari Froshad Narain Singh v. Mahomed Syud*, I. L. R., 6 Cal., 608, 613.

(3) *Mohanlal Jechand v. Amratlal Bechardas*, I. L. R., 3 Bom. 174. But see *Pickering v. Rudd*, 4 Camp, 219; *Harvey v. Walters*, L. R., 8 O. P. 162. Where a room or other substantive part of a building, belonging to one person, overhangs or otherwise projects over land belonging to another, the question as to the right to the projecting portion is clearly one of property and not of easement; See, *e.g.*, *Corbett v. Hill*, L. R., 9, Eq. 671; *Laybourn v. Gridley*, L. R., 1892, 2 Ch. 53.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

Illustrations.

(a) A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.

(b) A right of way annexed to A's house over B's land. This is a discontinuous easement.

(c) Rights annexed to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(d) A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.

Commentary.

The fact of an easement being continuous or not, and apparent or not, is of importance in that class of cases where on a severance of "land," the question is whether there has been an implied grant, or an implied reservation, of an easement, other than an easement of necessity, in favour of the owner of one portion over the other portion. See Sec. 13, subsections (b), (d), (f), and commentary thereon.

An easement consisting of a right of a person to the uninterrupted flow of a permanent artificial stream to his land is a continuous easement. (1)

(1) *Morgan v. Kirby*, I. L. R., 2 Mad., 46, 53, 56.

Positive and
negative ease-
ments.

Easements are also divisible into positive, and negative easements. This division is, practically, made in Sec. 4. Positive easements are those which involve a right in the dominant owner to do something on the servient tenement; negative easements give him no right of doing any such thing, but only impose an obligation on the servient owner to refrain from doing something on his own tenement and thereby involve a right in the dominant owner to enjoy a benefit or advantage over the servient owner's tenement. Examples of the former class are a right of way, and all *profits à prendre*, they being rights to take or appropriate something from or in the servient land; examples of the latter are a right to light, or to air, or to the uninterrupted flow of an artificial watercourse from the servient into the dominant tenement. The obligation of the servient owner, on the other hand, is always of a negative character: in the case of positive easements, he is bound to abstain from obstructing the act which the dominant owner is entitled to do on his land; in the case of negative easements, he is bound to abstain from using, or doing something on, his land which would interfere with the right of enjoyment which the dominant owner has over it. He is always under some restriction⁽¹⁾ depriving him of some one of the ordinary rights of enjoyment or use of his property which as an owner he would otherwise have; he is never bound to do anything for the benefit of the dominant owner, as such.⁽²⁾ It may be remarked that rights *ex jure nature in alieno solo* are always of a negative character.⁽³⁾ In acquiring a title by prescription to a positive easement, the enjoyment of the benefit involves a trespass on the tenement over which the benefit is enjoyed, as in the case of a way, or in the case of any *profit à prendre*; but in such acquisition of a negative easement, the enjoyment involves no trespass on the burdened tenement, but is simply a lawful user, by the acquirer of the right, of his own tenement.

(1) See s. 7.

(2) See s. 27.

(3) See s. 7, para. (b) and *Illustrations*.

Hence acquiescence on the part of the burdened owner is more easily proved or presumed in the case of prescriptive claims to positive easements than in such claims to negative easements; see note to Sec. 15 (1). Hence also resistance by the burdened owner in the former case can be made by way of legal proceedings taken as well as by a physical obstruction made on the burdened tenement; in the latter case only by such physical obstruction. (2)

As to cases of rights of way where the way is over a formed road, see note to Sec. 13, sub-section (b). *Illustration(b)*

6. An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

Easement for limited time or on condition.

Commentary.

An easement for a term of years or other limited time can be created by grant, or by covenant, but cannot be acquired by prescription: see notes to ss. 8 and 15.

As to easements exercisable only at certain times, or for a particular purpose, see note to Sec. 9.

7. Easements are restrictions of one or other of the following rights (namely):—

Easements restrictive of certain rights.

(a) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

Exclusive right to enjoy.

(1) And see *Bhuban Mohan Banerjee v. Elliott*, 6 Beng. L. R., 105, 106.

(2) See remarks of the Court of Appeal in *Sturges v. Bridgman*, L. R., 11 Ch. 64, cited in note to s. 15 (below).

Rights to
advantages
arising from
situation.

(b) The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustrations of the Rights above referred to.

(a) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(b) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(c) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(d) The right of every owner of land to so much light and air as pass vertically thereto.

(e) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the “subjacent and adjacent soil” mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

(h) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interrup-

tion and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(i) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

(j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

Commentary.

Easements being restrictions on rights incidental to the ownership of land, on the extinction of an easement the right restricted, so far as it was restricted, immediately revives, by force of such ownership. (1)

An easement imposing on the servient owner a restriction on his natural right to build on his land so as to exclude the access of air cannot be acquired by prescription except where the access of air is claimed in respect of windows or apertures made for the reception of air in a building on the land of the dominant owner. An easement of air for a windmill or for

Illustration(a)
Air.

(1) *Sury v. Pigot*, Popham 166. As to the general nature of "natural" rights or rights *ex jure naturæ*, see *Bonomi v. Backhouse*, E. B. & E. 655; *N. E. Ry. Co. v. Elliott*, 1 J. & H. 145; 29 L. J., Ch. 812; *Moore v. Rawson*, 3 B. & C. 339.

a chimney cannot be so acquired. See note to Sec. 17, sub-section (b). As to whether such an easement can be acquired by grant or covenant, see the same note.

The erection of a building by a neighbour on his adjoining land may be objectionable or even detrimental to the owner of a tenement, as where the defendants erected a Hindu temple on ground close to the plaintiffs' mosque,⁽¹⁾ and where by B building on his adjoining land A's shop became concealed from the view of customers and his trade diminished in consequence,⁽²⁾ or where by the defendant building on his adjoining land the access of light to the plaintiff's windows was excluded,⁽³⁾ but the neighbour cannot be restrained from exercising his right of so building, unless a right to light or to air or some other easement which would be interfered with by such building has been acquired, in one or other of the modes in which easements are acquirable.

Illustration(b) Every owner or occupier of land has a natural right that the air on or over his land shall not be polluted by any other person; just as, if a natural stream passes through his land, he is entitled, as against others, that the water as it passes through his land shall be unpolluted. But this does not mean that he is entitled to absolute purity of such air. A right so extensive as that would be unreasonable, because practically incompatible with the exercise by others of their rights even in the most ordinary and necessary acts and pursuits of life, especially in towns. The extent and limits of this natural right are defined by, and will be best understood by reference to, the decisions in actions for nuisances by infringement of this right. These decisions show that the right is not violated unless "the annoyance is such as materially to interfere with the ordinary comfort of human existence;"⁽⁴⁾ this, then, is the measure of the extent of the right.

Looking to the position of the person who causes the nui-

(1) *Kasim Ali Khan v. Birj Kishore*, 2 N. W. P., H. C. R. 182.

(2) *Ram Rooch Chowdree v. Deokee Nundun*, 2 N. W. P., H. C. R. 169.

(3) *Sarubai Kom Jitmal v. Bapu Narhar Sohoni*, I. L. R., 2 Bom. 660.

(4) *Per Lord BOMILLY, M.R.*, in *Crumpp v. Lambert*, L. R., 3 Eq., p. 413.

sance, he is bound by the rule *sic utere tuo ut alienum non lædas*; if a use which he makes of his land causes a nuisance to the occupier of other land, he is *primâ facie* liable as for a tortious nuisance. But there is an exception to the general application of this rule: in all cases where the acts causing nuisance are necessary for the common and ordinary use and occupation of land and houses, such acts may be done, if conveniently done, without subjecting those who do them to an action; e.g., burning weeds, emptying cess-pools, making noises during repairs, though they cause a nuisance, are justifiable. There is an obvious necessity for this exception to the general principle expressed in the maxim '*sic utere tuo ut alienum non lædas*.' "It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."⁽¹⁾ But the right to purity of air is not affected by the circumstance that the act or thing causing the nuisance is for the public benefit; nor could a disturbance of a right to purity of water of a stream, of a right to build, or of any other natural right of a landowner, be justified on the ground of public utility.⁽²⁾

If the sources of the pollution of the air are situate on the plaintiff's own premises or on those of a third party, and are caused by the plaintiff, or such third party, the fact that the defendant, an adjoining landowner, by building on his land has interrupted the current of air over the plaintiff's premises, by which the unwholesome exhalations polluting the air over the plaintiff's premises had been carried off, and the plaintiff's house has been rendered less healthy and comfortable by the consequent bad smell and stuffiness of the

(1) Per BRAMWELL, B., in *Bamford v. Turnley*, 3 B. & S. 83, 84.

(2) Per BRAMWELL, B., in *Bamford v. Turnley*, 3 B. & S. 86.

air entering its windows, constitutes no infraction on the defendant's part of the plaintiff's natural right to purity of air, but whether it is an infraction of an acquired right of the plaintiff to such current of air in respect of his windows is another question.⁽¹⁾

Illustration(d) There is no natural right to light or air coming laterally to a man's tenement, *i.e.*, over the land of another. Such a right can only be acquired as an easement⁽²⁾: no natural right of A is infringed by his neighbour, B, building on his (B's) land and thereby shutting out or diminishing the flow of air, or the passage of light, over B's land to A's tenement.⁽³⁾

Illustration(e) . Wherever, which is perhaps more often than otherwise the case, land is supported not only by the soil immediately underlying it, but also partly by the soil lying beside it, then the owner of such land is entitled, by natural right, to so much support from his neighbour's adjacent land as may be necessary for supporting the former land as it stands in its natural condition, *i.e.*, without the addition of any building or other weighty object which might be built or set upon it. To what distance or lateral extent through the adjacent land the natural support is, in such a case, required, depends, of course, on the quality of the soil. And where the land consists of hard rock, it may require no support from the adjacent land, so that the owner of the former has no such right of vicinage over the owner of the latter. Where the soil is loose, friable or unstable, and the land of the adjoining land-owner is a narrow piece, the right of support may extend to land of one or more owners beyond the adjoining land.⁽⁴⁾

Where the surface or superjacent soil belongs to one person and the subjacent soil to another, as where one person has

(1) *Chastey v. Ackland*, L. R., 1895, 2 Ch. 389; L.R., 1897, A. C. 155. See note on this case in commentary on s. 17.

(2) *Sarubai Kom Jitmal v. Bapu Narhar Sohoni*, I.L.R., 2 Bom. 660; *Chastey v. Ackland*, L. R., 1895, 2 Ch. 389, 402, *per* Lindley, L. J.

(3) *Chastey v. Ackland*, L. R., 1895, 2 Ch. 389, 402.

(4) See *Corpn. of Birmingham v. Allen*, L. R., 6 Ch. D., p. 289 (*per* JESSEL, M. R.) and p. 203 (*per* JAMES, L. J.)

the minerals and right to mine in the soil underlying land belonging to another proprietor, the owner of the surface soil is entitled to support of it in its natural state from the subjacent soil. (1) This right exists even in cases where it is impossible to work subjacent mines without destroying or damaging the surface land. (2) ; unless it has been superseded by an Act of the Legislature or by an agreement, express or implied, whereby a right to mine is granted, or reserved, (as the case may be), notwithstanding that it causes subsidence, destruction, or damage to the surface. (3)

The natural right of the surface-owner to support from subjacent or adjacent soil does not disentitle the owner of the subjacent or adjacent soil to disturb or alter the natural state of that soil. If it did, it would be useless for a person to own mines under surface land belonging to another, as he could not work them. The obligation of the owner of the subjacent (or of the adjacent) land is merely an obligation to support the superincumbent (or the laterally dependent) land as it exists in its natural state, and he is entitled, if he chooses, to effect this support by leaving columns or pillars of the natural soil, or placing artificial pillars, sufficient to support the superjacent (or lateral) soil—as is frequently done in the case of mines, where the minerals and the surface belong to different proprietors. (4) He can, in fact, deal with his subjacent (or adjacent) soil as he pleases, provided he supports, by some means or other, the land which he is bound to support, in its natural position. And the right of the owner of the land entitled to the support is only a right of enjoyment of his own property, and, as in the case of an easement of support, (5) is not infringed unless and until a subsidence of his land takes place in consequence of the non-

(1) *Humphries v. Brogden*, 12 Q. B. 739; *Rowbotham v. Wilson*, 8 H. L. C. 348.

(2) *Hest v. Gill*, L. R., 7 Ch. App. 699, 713, 714.

(3) *Duke of Buccleuch v. Wakefield*, L. R., 4. H. L. 377; *Hest v. Gill*, L. R., 7 Ch. App. 699.

(4) *Backhouse v. Bonomi*, 9 H. L. C. 503, and, in Exch. Ch., E. B. and E. 646.

(5) See s. 34.

maintenance of the required support.⁽¹⁾ It appears from the decisions that an action will lie for nominal damages for subsidence of land, so caused, though no actual damage has resulted; the subsidence itself being an *injuria*, as an invasion of the plaintiff's proprietary rights, even though unattended by any damage estimable in money.⁽²⁾ Whence it follows that limitation time in a suit for damages begins to run from the date when the subsidence occurred, and not from the time when the removal of the means of support, which caused the subsidence, took place; unless both the subsidence and cause of the subsidence occurred simultaneously.⁽³⁾

The natural right to support, though it cannot be increased by the erection of buildings or by otherwise increasing the weight and pressure of the land upon the subjacent or adjacent ground (a right to any such increment of support being acquirable only as an easement), on the other hand is not lost or diminished by any such addition of weight or pressure.⁽³⁾ And the natural right will entitle the person having it to damages for injury to a house erected on the land, provided the weight of the house did not contribute to the subsidence,⁽⁴⁾ and provided also that some appreciable damage would have been sustained by the land itself even if there had been no building on it.⁽⁵⁾

The support to which a landowner is entitled *ex jure naturæ* from the adjacent, or the subjacent, land, is confined to such an extent of adjacent land as in its natural undisturbed state was sufficient to afford the requisite support. Therefore if between the land of A and that of B, there is intermediate

(1) *Backhouse v. Bonomi*, 9 H. L. C. 503; in Exch. Ch., E. B. & E. 646; *Smith v. Thackerah*, L. R., 1 C. P. 564; *Darley Main Colliery Co. v. Mitchell*, L. R., 11 App. Ca. 127; and see note to s. 34.

(2) See *Attorney-General v. Conduit Colliery Co.*, L. R., 1895, 1 Q. B. 301, 311 (Judgment of COLLINS, J.,) and the Judgments of BOWEN, L. J. and FRY, L. J. in *Mitchell v. Darley Main Colliery Co.*, L. R. 14 Q. B. D. 125. And see note to s. 33, *Expl. I.*

(3) *Brown v. Robins*, 4 H. & N. 186.

(4) *Stroyan v. Knowles & Hamer v. Knowles*, 6 H. & N. 454.

(5) *Smith v. Thackerah*, L. R., 2 C. P. 564.

land of C, in which excavations (*e. g.*, by mining) have been made by C, the effect of which excavations is that when B excavates his land, A's land subsides, which subsidence would not have occurred if the intermediate land of C had been in its natural state, A has no right of action against B. (1)

The natural right to support does not supersede or defeat the natural right [see *Illustration (g)*,] of the subjacent or adjacent soil-owner to collect and dispose of water percolating through the supported land into such subjacent or adjacent land; in other words, a landowner has no natural right to the support of such underground water in his land. A was the owner of some cottages and of the land on which they were built, which was of a wet and spongy character. B, the owner of adjoining land, intending to build a church thereon, in order to secure the foundations, drained his land; the effect of which was to withdraw the water lying in A's subsoil, and in consequence of this A's cottages subsided and were damaged. It was held that B was not liable for the damage. (2)

The easement which is a restriction of this natural right to support is, of course, an acquired right which the subjacent, or the adjacent, landowner has so to deal with his land as to remove the support which he would, but for the easement, be bound to maintain to the incumbent land of the other party. (3)

Easements of support are rights to have support additional to, or different from, the support to which natural right entitles. One case is a right of support to a building from land. Another is a right of the owner of a surface stratum of land, which has been altered by quarrying or otherwise, to a greater degree of support than such stratum would have

(1) *Corporation of Birmingham v. Allen*, L. R., 6 Ch. D. 284.

(2) *Popplewell v. Hodgkinson*, L. R., 4 Ex., 248.

(3) *Dizon v. White*, L. R., 8 App. Cas. 833; *Bell v. Love*, L. R., 10 Q. B. D. 547; *Rowbotham v. Wilson*, 8 H. L. C. 348; *Buchanan v. Andrew*, L. R., 2 H. L., Sc. 286; *Aspden v. Seddon*, L. R., 10 Ch. App. 394; *Smith v. Darby*, L. R., 7 Q. B. 716.

required in its natural state. Another is a right of support to a building from another building.

The right of the owner of an upper story of a house to support from the lower story, supposing such lower story to belong to another person, is an easement of necessity. "The owner of the upper story, without any express grant, or enjoyment for any given time, has a right to the support of the lower story." (1) "Where a house is divided into different floors or stories, each floor belonging to a different owner, the proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight." "The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." (2) See also *Illustration (m)* to Sec. 13 of this Act.

Illustration (f)

A person who discharges polluting matter into the water which would have the effect of fouling it if it was pure, is not excused by the fact that the water is already polluted by others. (3) In *Stockport Waterworks Co. v. Potter* (4) MARTIN, B., in his judgment intimated as his opinion that the fact that pollution of water with noxious matter is caused by the carrying on of a trade which is necessary or useful to the public, is no justification of the pollution, even if it is carried on in a reasonable and proper manner and place; but that point was not a necessary one for the decision of the case, nor was it decided on it, as there was no evidence for the defendants that the trade was carried on in a reasonable and proper manner, and there was evidence for the plaintiffs *contra*. As to water naturally percolating or passing in

(1) Judgment of Queen's Bench in *Humphries v. Brogden*, 12 Q. B., at p. 747.

(2) *Erskine's Inst. of Law of Scotland*, Bk. 2 tit. 9, s. 11, cited in *Humphries v. Brogden*, 12 Q. B., p. 757. And see *Richards v. Rose*, 9 Ex. 221.

(3) *Crossley v. Lightowler*, L. R. 2 Ch. App. 478.

(4) 7 H. & N., 160, 169.

undefined channels through, or over the soil, though a land-owner has no right to water so passing into his land from a neighbour's land, and the neighbour can lawfully prevent such passage of water by draining or otherwise dealing with his own land, (1) yet the former has a right that such water shall not pass to his land in a polluted state through any act of the neighbour which, though committed on such neighbour's own land, and otherwise perfectly lawful and proper (as, *e.g.*, making a cess-pool), has that effect. (2)

The law as to underground water percolating or passing *Illustration(g)* in undefined channels through the strata became settled by the decision of the House of Lords in *Chasemore v Richards*, (3) in which it was held that to such water the principles which regulate the rights of owners of land in respect to streams or water flowing in defined channels do not apply, and that the owner of land containing underground water which percolates by undefined channels and thus finds its way into the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it. And his right to do this is unaffected by the motive with which he does it: the act does not become illegal because done, not with a *bonâ fide* intention of improving his land, but with intent to induce his neighbour to buy him out, or even maliciously to injure him; no use of property which would be legal if due to a proper motive becoming illegal because it is prompted by a motive which is improper or even malicious. (4) The owner of land part of which is covered with a portion of a reservoir or tank is *primâ facie* entitled to make a cutting through a part of the band of the tank on his own land, and draw water from the reservoir to a village on another part of his land and it lies on the owner of the adjoining land on which the greater

(1) *Chasemore v. Richards*, 7 H. L. C. 349.

(2) *Ballard v. Tomlinson*, L. R., 28 Ch. D. 115; *Womersley v. Church*, 17 L. T. (N. S.) 190.

(3) 7 H. L. C. 349.

(4) *Mayor, &c., of Bradford v. Pickles*, L. R., 1895, App. Cas. 587; 1895, 1 Ch. 145.

portion of the reservoir stands, if he seeks to restrain him from so doing, to prove that he has an easement entitling him so to restrain him. (1)

Illustration(h) A riparian owner, whose land abuts on a navigable stream, where such stream is navigable, has the same rights, as such, as one whose land abuts on a non-navigable stream. (2) Rights which are not mentioned in this or any other *Illustration* to this section, are the right which a riparian owner whose lands abut on a navigable stream, has to have access from the stream to his land and from his land to the stream, (3) and the similiar right which the owner of land adjoining the sea has of access from his land to the sea and *vice versa*. (4) So the owner of land abutting on a public road has, as such, a similar right of access to and from his land and the highway. (5) In these cases the riparian or roadside landowner, if his access is obstructed, has his private remedy as such landowner; besides having, as a member of the public, his public remedy for the obstruction to a public highway, (6), and also the civil remedy accruing by reason that he has sustained a special or particular injury from the public nuisance. (7) It was on the third and last of these grounds that *Fazal Haq v. Maha Chand* (8), in which the plaintiff's access to a public highway from his premises, which abutted on it, had been obstructed by the defendant, was decided, in the plaintiff's favour; but it might have been decided also upon the first of those grounds.

(1) *Hari Mohun Thakur v. Kissen Sundari*, 1 L. R., 11 Cal. 51. See also remarks of INNES, J., in *Robinson v. Ayya Krishnama Chariyar*, 7 Mad. H. C. R. 46.

(2) *Lyon v. Fishmongers Co.*, L. R., 1 App. Ca. 662., 674; *North Shore Ry. Co. v. Pion*, L. R., 14 App. Ca. 612.

(3) *Lyon v. Fishmongers Co.*, L. R., 1 App. Ca., 662; *Rose v. Groves*, 5 M. & G. 613; *Original Hartlepool Collieries Co. v. Gibb*, L. R., 5 Ch. D. 713.

(4) *Attorney-Genl. v. Straits Settlement v. Wemyss*, L. R., 13 App. Ca. 192.

(5) *Lyon v. Fishmongers Co.*, L. R., 1 App. Ca. 676; *Rose v. Groves*, 5 M. & G. 613.

(6) Indian Penal Code, s. 283; Crim. Pro. Code (Act X of 1882), ss 133-143.

(7) *Fritz v. Hobson*, L. R., 14 Ch. D. 542.

(8) 1 L. R., 1 All. 557.

Illustrations
(h) and (j)

The question what amounts to a material diminution in the quantity of the water of a stream, or, in other words, to what extent is an upper riparian proprietor entitled by natural right to use the water, depends to a certain extent upon the circumstances respectively of each case. In their judgment in *Embrey v. Owen*, (1) which was an action against an upper riparian proprietor for diverting water of a stream for irrigation of his land, the Court said: "The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water, nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbour above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water." "On the one hand it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, should be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could

(1) 6 Exch. 353.

not dip a watering-pot into the stream, in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not." If a riparian proprietor takes water from the river and after using it for certain purposes returns it, at a point within his land, into the river, unpolluted and undiminished in quantity, this is no infringement of the rights of a lower riparian owner; and the case is the same if the water is so taken, used, and returned by an owner of land not abutting on the river, under a license from the upper riparian owner. (1) The diversion by a waterworks company of water of a stream into a reservoir for the supply of an adjacent town, and the diversion of such water for supplying a lunatic asylum and gaol, were held to be not within the limits of a reasonable and justifiable use of the water by an upper riparian proprietor, and to give a right of suit to the lower proprietor for damages or an injunction. (2) Detention of the water of a stream by an upper riparian owner for the purposes of irrigation, whereby the water, though not sensibly diminished in quantity when it reached the plaintiff's land lower down the stream, did not reach it till it was too late in the day for the latter to use it for the irrigation of his land, was held to be an invasion of plaintiff's natural right. (3) In the judgment in *Miner v. Gilmour* (4) a distinction was drawn between an "ordinary" and an "extraordinary" use of the water by a riparian proprietor, and the law was laid down thus: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use

(1) *Kensit v. G. E. Railway Co.*, L. R., 27 Ch. D. 122; 23 Ch. D. 566.

(2) *Wilts & Berks Canal Co. v. Swindon Waterworks Co.*, L. R., 7 H. L. 697; *Medway Co. v. Earl of Rodney*, 9 C. B., N. S., 575.

(3) *Sampson v. Hoddinett*, 1 C. B., N. S., 590.

(4) 12 Moore, P. C. 131. See also *Ormerod v. Todmorden Mill Co.*, L. R., 11 Q. B. D. 155.

of the water flowing past his land ; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation." In *Earl of Sandwich v. Great Northern Railway Co.*(1) the defendant Company, whose line traversed the bank of, and crossed, a stream, at a certain spot, so as to constitute them riparian owners, used water of the stream for supplying their locomotive engines and for the general purposes of their neighbouring Station. It was found on the evidence that the quantity of water so taken only reduced the depth of the stream by one-fifth of an inch. The suit of the plaintiff, a mill-owner lower down the stream, for an injunction was dismissed, the defendants' user of the water being held reasonable. If there has been a material diminution or interruption of the flow of the water to the riparian owner's land, it is not necessary that actual damage should have been sustained ; "if the user, by the defendant, has been beyond his actual right, it matters not how much the plaintiff has used the water, or whether he has used it at all. In either case, his right has been equally invaded and the action is maintainable." (2) Any disturbance of the regular natural flow of a natural stream, so as to materially diminish or increase the force (3) or the quantity of the flow, or the direction of the current (4), or the temperature of the water, or so as

(1) L. R., 10 Ch. D. 707. See also *Kensit v. G. E. Railway Co.*, L. R., 23 Ch. D. 566.

(2) *Sampson v. Hoddinott*, 1 C. B., N. S., 590, 611 ; *Bickett v. Morris*, L. R., 1 H. L., Sc. 47, 55 ; and see Judgment in *Embrey v. Owen*, 6 Exch. 368. And see note to S. 33, Expl. I.

(3) *Robinson v. Lord Byron*, 1 Bro. C. C. 588.

(4) *Bickett v. Morris*, L. R., 1 H. L., Sc. 47.

to force back the water of the stream and prevent its free flow past the lands of an upper riparian proprietor onward (1) is wrongful and actionable, and that even though no damage has actually been sustained, if the alteration involves risk of injury. (2) Where, however, the defendants, who occupied and cultivated lands on both sides of a natural stream had (not by virtue of any easement) raised embankments on both sides of it to prevent their lands from being submerged when the stream, as happened at times, was in flood, and by so doing caused the stream to inundate the lands of the plaintiff, a lower riparian proprietor, who thereby sustained damage, but it was found that the defendants could not by any other reasonably practicable means have protected their lands from such submersion without causing damage to the plaintiff, it was held that no actionable wrong had been committed by them. (3) The natural rights of riparian owners under consideration do not exist where the stream is an artificial stream. (4)

In the case of natural streams a riparian proprietor is entitled, as against upper riparian proprietors, to have the water of the stream flow to his land without sensible alteration in its natural character or quality, and this right will be infringed not only if by such alteration the water is rendered unfit for primary or ordinary purposes, such as drinking and washing, but also if it is thereby rendered unfit for what have been termed secondary purposes, such as, *e. g.*, that of distillation. In *John Young and Co. v. Bankier Distillery Co.*, (5) the plaintiffs were owners of land abutting on a natural stream and of a distillery built on the land. The water of the stream in its natural state was soft in quality and, as such, suitable for distilling, for which

(1) *Subramaniya Ayyar v. Ramachandra Rau*, I. L. R., 1 Mad., 335, 340; *Cooper v. Barber*, 3 Taunt., 99, 110.

(2) *Bickett v. Morris*, L. R., 1 H. L., Sc, 55; *Subramaniya Ayyar v. Ramachandra Rau*, I. L. R., 1 Mad., 335, 340.

(3) *Gopal Reddi v. Chenna Reddi*, I. L. R., 18 Mad. 158.

(4) *Sampson v. Hoddinott*, I. C. B., N. S., 590.

(5) L. R., 1893, A. C. 691.

the plaintiffs had used it. The defendants were lessees of a colliery in land bordering 'the stream higher up than the plaintiffs' land, and in the course of their mineral workings they raised by pumping from a pit and discharged into the stream water which, though pure, was hard in quality, and thereby the water of the stream flowing to the plaintiffs' land was rendered very hard and much less suitable for distilling purposes than it was in its natural state, though it was not rendered unfit for primary purposes. The water so artificially introduced into the stream by the defendants would not have reached it by gravitation either before or whilst it flowed past the plaintiffs' land. The plaintiffs were held entitled to a decree for damages and interdicting the defendants from discharging the mine water into the stream, even though it might be true, as alleged by the defendants, that they could not work their mine without discharging the water which accumulated in it and that this stream was the natural and proper channel to carry off the surplus water of the district. On the question—which it was not necessary to decide, but which had been decided by the lower appellate Court—whether if the same alteration in the quality of the water of the stream, rendering it unfit for secondary purposes, but not unfit for primary purposes, had been produced not by the introduction of foreign water into it but by water being taken from the stream by the defendants and used for some manufacturing process and then returned to the stream, the plaintiffs' right would have been equally infringed, three of their Lordships of the House of Lords (1) expressed the opinion, in dissent from that of the lower appellate Court, that in such case there would likewise have been an infringement of the plaintiffs' right.

It had previously been decided, by the Court of Common Pleas, in *Baird v. Williamson* (2) and the decision was

(1) Lords Watson, Macnaghten, and Shand, in their respective judgments. The other three Lords, Lord Herschell, L. C., and Lords Ashbourne and Morris did not deliver judgments but merely expressed concurrence.

(2) 15 C. B. (N. S.) 376.

approved of by the House of Lords in *John Young and Co. v. Bankier Distillery Co.*, that if in the course of working a mine in the usual and proper manner underground water rises to the surface by gravitation and flows down to a lower proprietor's land, no legal injury to him is committed by the owner of the mine, but that such an injury is committed if the latter by artificial means, as by pumping, raises water to the surface which would not be so raised by natural causes, and it is discharged on to the land of the former.

In *Sangili Veera P. O. Tambiar v. Sundaram Ayyar* (1) the plaintiff, a lower riparian proprietor, claiming the exclusive right to the waters of a natural stream, sued for an injunction to restrain the defendants, who were upper riparian proprietors, from using the water of the stream, even to such extent as they would have been, but for such alleged easement of the plaintiff, entitled to use it as riparian proprietors. Some years previously a Forest Settlement Officer, who by a notification under section 4 of the Madras Forest Act, 1882, applying to the *locus in quo*, had been invested with the powers conferred by the Act in relation thereto, had, after due enquiry, decided against the plaintiff's claim to the same exclusive right. It was held that the Forest Settlement Officer had jurisdiction under sections 10 and 11 of the Act to adjudicate on the question, and that his decision, the plaintiff not having appealed against it under section 10, became final, and was a bar to the plaintiff's suit.

Illustration(i) The right of the owner of upper land, mentioned in *Illustration (i)* is exceeded if he causes the water to pass on to the lower land of his neighbour otherwise than naturally. Where from an extraordinary rainfall, water was accumulated against one side of the defendants' railway embankment, and in order to protect the embankment, which was endangered thereby, the defendants cut trenches in it, by which the water flowed on to the plaintiff's land, which adjoined the embankment on the other side and was on a lower level, and flooded

(1) I. L. R. 20 Mad. 279.

and damaged it, in an action for damages the defendants were held liable. (1) If the owner of the lower land has erected a dam on his land which has the effect of obstructing the natural surface drainage of the surplus rain-water of the upper land, he is not bound to remove the dam altogether if by reducing its height it will cease to have that effect. (2) Where an 'al' runs along the boundary line between the upper and lower lands, and the surface drainage water of the upper land has from time immemorial, or for the prescriptive period, been accustomed to flow uninterruptedly through certain passages or openings in the 'al,' the owner of the upper land has a right to discharge such water through such passages (3), though in such a case the right may be more properly to be regarded as an easement than a natural right.

Another natural right, not mentioned in the *Illustrations* to this section, in respect of which easements relating to water may be acquired, by prescription, by custom, or by grant, is the right of a landowner that his land shall not be flooded or damaged by a discharge of water artificially created by another landowner; as, *e.g.*, by B, a neighbouring landowner, getting rid of water in his land by discharging it, through an artificial drain or watercourse, on to A's land. (4)

Right to prevent artificial discharge of water.

(1) *Whalley v. Lancashire & Yorkshire Ry. Co.*, L. R., 13 Q. B. D. 131.

(2) *Abdul Hakim v. Gonesh Dutt*, I. L. R., 12 Cal. 323.

(3) *Imam Ali v. Poresch Mundul*, I. L. R., 8 Cal. 468.

(4) *Arkwright v. Gell*, 5 M. & W., 203, 228; *Wright v. Williams*, 1 M. & W. 77; *Metropolitan Board of Works v. L. & N. W. Railway Co.* L. R., 17 Ch. D. 246. *Bala v. Maharu*, I. L. R., 20 Bom. 788. The right in the case where the flooding is caused by a lower riparian owner damming up the stream and so penning back the water appears to be covered by the words "without interruption" and "without material alteration in quantity, . . . force" in *Illustration (h)*. See note to that *Illustration*.

CHAPTER II.

THE IMPOSITION, ACQUISITION AND TRANSFER OF
EASEMENTS.

Who may im-
pose ease-
ments.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

Illustrations.

(a) A is tenant of B's land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(b) A is tenant for his life of certain land with remainder to B absolutely. A cannot, unless with B's consent, impose an easement thereon which will continue after the determination of his life-interest.

(c) A, B and C are co-owners of certain land. A cannot, without the consent of B and C, impose an easement on the land or on any part thereof.

(d) A and B are lessees of the same lessor, A of a field X for a term of five years, and B of a field Y for a term of ten years. A's interest under his lease is transferable; B's is not. A may impose on X, in favour of B, a right of way terminable with A's lease.

Commentary.

Creation of
easements by
Legislature.

A mode of acquisition of an easement which is not mentioned in this Act, is the case of the creation by the Legislature of an easement in favour of A as against B; as, *e.g.*, where a Canal Company was invested by Act of Parliament with an easement to take water from a river for the supply

of their Canal. (1) Under Inclosure Acts, by which the upper or surface strata and the lower strata of the lands dealt with by the Act are vested respectively in different owners, the question whether the owner of the lower strata has or has not the right of mining therein to such an extent as to entitle him to cause subsidence of the surface has arisen in many cases, and more than once has come before the House of Lords; the decision of the question depending in each case on the construction of the particular Act under consideration. (2) As to how Acts of Parliament, under which surface land is vested in persons or bodies of persons for the purpose of constructing a canal, railway, or other work, ought to be construed with reference to the question whether they are entitled to support for the work so to be erected or constructed from the subjacent or adjacent lands, Bowen, L.J., in his judgment in *L. & N.W.R. Co. v. Evans*, (3) said:

"In each case the act of Parliament is all powerful, and, when its meaning is unequivocally expressed, the necessity for rules of construction disappears and reaches its vanishing point. Where the intention of the Legislature has been left to be collected from principles of reason, there are one or two obvious principles which have to be borne in mind. One such maxim, similar to that which has been alluded to as governing the case of private grants, seems obvious also with regard to Acts of Parliament. Where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to make and to maintain it. More especially would this seem reasonable when the thing to be constructed is one of public advantage and utility, in which the public are to have rights. The maxim of good sense and law so stated becomes applicable with more or less stringency according to

(1) *National Guaranteed Manure Co. v. Donald*, 4 H. & N. 8. In such cases, provision is usually at the same time made entitling the riparian owners, or other servient owners, prejudicially affected, to compensation for any damage entailed. See also *Attorney-General v. Corporation of Plymouth*, 9 Beav. 67.

(2) *Duke of Buccleuch v. Wakefield*, L. R. 4 H. L. 377; *Love v. Bell*, L. R. 9 App. Cas. 286; 10 Q. B. D. 547; *Consett Waterworks Co. v. Ritson*, L. R. 22 Q. B. D., 702, 318; *Bell v. Earl of Dudley*, L. R. 1895, 1 Ch. 182.

(3) L. R. 1893, 1 Ch. 16, 27.

the scope of the Act of Parliament. On the other hand, the Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle as it can override the former, if it sees fit to do so, but it is not likely that it will be found disregarding it, without plain expressions of such a purpose. These two maxims or principles appear to bear on the construction of statutes like the present, and may be called canons of construction, not because they are inflexible doctrines, but because they are doctrines of sound sense and obvious justice, to be borne in mind in dealing with legislation, which cannot be supposed, unless it so explicitly states, to neglect what is reasonable and business-like on the one hand, or what is natural justice on the other. It is evident that when both a right to make and maintain a work necessarily requiring support is given, and a mode of compensation also is provided for those whose lands will have to furnish such support, the two maxims work in harmony with, and are not drawn into conflict with, one another. The reasons for supposing, in the absence of a controlling context, that the Act designed the right of necessary support to be enjoyed seem in such a case to become overwhelming. When no right of compensation is furnished by the Act the case is different. The two maxims then appear to draw us in different directions, and their antinomies have to be adjusted by a careful examination of the statute itself. It is by the light of these two principles when they coincide in favour of one view of the statute, by their adjustment and reconciliation when they appear to conflict, that various cases have been decided, falling on one side or the other of the line, according to differences in the statutes which have to be construed; such cases, for instance, as *Metropolitan Board of Works v. Metropolitan Railway Co.*, (1) as explained by Sir G. Jessel, M. R., in *Roderick v. Aston Local Board* (2), *In re Corpn. of Dudley* (3), and in *Benfieldside Local Board v. Consett Iron Co.* (4). "

In that case the plaintiffs' predecessors in title had been authorized by a private Act of Parliament to make an existing brook navigable, and for that purpose to enlarge it, to make new cuts or canals for water through the adjoining lands, to

(1) L. R. 3 C. P. 612, 623; 4 C. P. 192.

(2) L. R. 5 Ch. D. 333.

(3) L. R. 8 Q. B. D. 86.

(4) L. R. 3 Ex. D. 54.

erect bridges, locks and other works, and also (among other powers) to dig and carry away soil or stone from any grounds (except those of certain specified descriptions) of any persons adjoining the brook; first giving satisfaction (to be settled by agreement or, failing that, by certain commissioners) to the owners of such lands as should be dug, cut, removed or otherwise made use of or damaged by such works and operations. The brook, when made navigable, was to be open to the public for navigation subject to payment of certain tolls to the "undertakers" or their assigns. The undertaking was carried out. No land was purchased by and conveyed to the undertakers, but compensation was paid to the land-owners portions of whose lands were used for carrying out the work of making the stream a navigable canal. Such compensation appeared to have been assessed solely with reference to the value of the surface lands. It was held that the terms of the Act relating to the right to compensation could not be construed as limited to damage to the surface, but entitled the owners of subjacent lands to claim compensation—at the time when compensation was to be, and was, settled, viz. before the construction of the works was commenced—in respect of so much of the minerals as could not be worked without causing subsidence of the canal or its works, if they had thought it worth while to do so, and that the proprietors of the canal had acquired under the Act a right to support for the canal and its works.

In *Knowles & Sons v. Lancashire & Yorkshire Railway Co.*,⁽¹⁾ and two subsequent cases about to be mentioned, the decisions turned entirely upon the construction of the Acts under which respectively the canals in question in the cases were made. Each of the three Special Acts respectively in question in these three cases contained two sections "almost identical in language and absolutely identical in scope and effect." By the first of these sections, nothing in the Act contained should affect the right of any owner of land to the

(1) L. R. 14 App. Cas. 248; 20 Q. B. D. 391.

mines and minerals lying within or under the lands to be made use of for the canal, and it should be lawful for him to work the same, not thereby injuring, prejudicing or obstructing the canal. By the second of such sections, if the owner of any mine should in pursuing such mine work near or under the canal so as in the opinion of the canal company to endanger or damage the same, or in the opinion of the mine-owner to endanger or damage the further working thereof, then it should be lawful for the company to treat and agree with the mine-owner for all such minerals near or under the canal as should be thought proper to be left for the security of the canal or mine, and in case of disagreement then at the request of either the company or the mine-owner a jury was to assess the satisfaction to be received by the mine-owner from the company, and upon payment thereof the mine-owner should be perpetually restrained from working the mine within the limits for which satisfaction should by the jury be adjudged to extend. In *Knowles & Sons v. L. & Y. R. Co.* (1) it was held, by the House of Lords, that the owner of minerals subjacent to the canal was entitled, having regard to the prohibition against his working so as to damage the canal, to initiate the proceedings provided for in the latter section and receive satisfaction for such minerals as should be thought proper to be left for the security of the canal, but that he was liable in damages if he worked the mine to the injury of the canal. In *Chamber Colliery Co. v. Rochdale Canal Co.* (2) it was held by the House of Lords, that as the statute imposed no liability on the owner of mines adjacent to, but not under, the canal for causing damage to the canal in working such mines, he could not, when the further working of those mines would endanger or damage the canal, but would not endanger or damage the further working of the mines, insist on his being restrained

(1) L. R., 14 App. Cas. 248; affirming the Court of Appeal, 20 Q. B. D. 391. See also *Cromford Canal Co. v. Cutts*, 5 Railw. Cas. 442.

(2) L. R., 1895, A. C. 564; affirming the Court of Appeal, L. R., 1894 2 Q. B. 632.

from working such portion of the minerals as was necessary to be left for rendering the canal secure from any damage, receiving satisfaction therefor; the canal owners being unwilling to treat for such portion of the minerals being left, preferring to bear the expense of such repairs as might become necessary from damage to the canal caused by the working of such portion of the minerals, such expense being expected by them to be much less than the satisfaction which they would have to pay for the mine-owner being restrained from working such portion of the minerals. In *New Moss Colliery Co. v. M. S. & L. Ry. Co.* (1) it was held that such owner of minerals adjacent to, but not underlying, the canal was entitled to work all such adjacent minerals, notwithstanding that the result might be to endanger or damage the canal, if the canal owner chose not to exercise his right of taking the prescribed proceedings for buying the mine-owner out of his right to work so much of such minerals as was required to be left for affording to the canal complete immunity from damage.

Section 20 contemplates an easement being "imposed" by a decree; yet there is nothing in this Chapter (11) as to such mode of "imposition" of an easement; unless the Legislature intended, that when a claim to an easement under Sec. 15 is established, which can only be effected in a contested suit, the decree in such suit is to be regarded as *imposing" the easement.

"Imposition" of easement by decree.

What is here termed "imposition" of an easement on a man's own land has been usually regarded and spoken of as creation of an easement, in favor of the owner of other land, either by grant or covenant.(2) But as there is no other sec-

Creation of easements by grant.

(1) L. R., 1897, 1 Ch. 725 (decision of Byrne, J.)

(2) The word "easement" is not defined in s. 4 to include the correlative burden or liability, as well as the right; strictly speaking, therefore, the expression "imposition of an easement" is incorrect. The word "imposed" is correctly used in s. 4, and at the end of this section (8), of the liability, not the right ("easement"). The word "servitude" may be used to signify either the right or the correlative liability: see Austin on Jurisprudence, p. 843, 4th Ed., by Campbell; A. Brown's Law Dictionary, title *Servitude*.

tion in the Act providing for the creation of easements by grant, this section is apparently intended to include not only the imposition by covenant, on the covenantor's land, of the burden which correlates to an easement over it, but also the creation by grant of an easement over the grantor's land; and that this was intended is also shown by the fact that in Sec. 9 the word "impose" is used and in the *Illustrations* thereto the word "grant."

Grant how
made.

By the English law a grant of an easement or of a *profit à prendre*, unless made by will, or an implied grant, must be made by deed and cannot be made orally; (1) this rule applying to all incorporeal hereditaments; (2) but if there has been part-performance of an oral agreement for an easement, such oral agreement can be enforced. (3) By the law of India, wherever the Transfer of Property Act applies, a grant of an easement by way of sale must be made by a registered instrument, an easement being an "intangible thing"; (4) and if made by way of gift, must be made by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. (5) A non-testamentary grant of an easement anywhere in British India where the Transfer of Property Act does not apply, must, if made in writing, and if the value of the easement be not less than Rs. 100, be registered. (6) Before that Act came into force, a valid

(1) *Hewlins v. Shippam*, 5 B. & C., 221, 229; *Duke of Somerset v. Fogwell*, 5 B. & C., 875; *Fentiman v. Smith*, 4 East, 107.

(2) 1 Steph. Comm. 653 (11th ed.); *Mayfield v. Robinson*, 7 Q. B. 486; *McManus v. Cooke*, L. R., 35 Ch. D. 688.

(3) *McManus v. Cooke*, L. R., 35 Ch. D. 681, 697, and cases therein cited. See also *Krishna v. Rayappa Shanbhaga*, 4 Mad. H. C. R. 100. In *Wheaton v. Maple & Co.*, L. R., 1893, 3 Ch. 48, at p. 65, Lindley, L. J., in his judgment, says, speaking of certain easements which can only be created by grant or covenant, that they can be created "by grant or by an agreement enforceable in equity, which for most purposes is as efficacious as a deed under seal." (*obiter dictum*).

(4) Act IV of 1882, s. 54. That an easement is included under the term 'property' as used in that Act is shewn by s. 6 (c) of that Act.

(5) See Act IV of 1882, s. 123, and the definition of immoveable property in Act I of 1868, s. 2, (5).

(6) See Act III of 1877, s. 17, and the definition of 'Immoveable property' in s. 3 of that Act. And see *Sultan Nawaz Jung v. Rustumji Nanabhoy*, I. L. R. 20 Bom. 704, 715.

grant of an easement could, and where in British India that Act does not apply, such a grant can, when the parties are Hindus, be made orally.⁽¹⁾

It is usually in the case of negative easements that the creation of an easement takes place by covenant; and in the case of positive easements that the creation is by grant.⁽²⁾ For in the former case, as, *e.g.*, in an easement of support or an easement of light, no active right, no right to do anything on the servient tenement, is created, but only an obligation is imposed on the servient owner to abstain, to a certain extent, from using, as, *e.g.*, excavating in or building on, his land, and the benefit to the dominant owner arises simply from that abstention on the part of the servient owner; but in the latter case a right is created to do something upon or in the servient tenement, and, though there is in this case too a negative obligation on the servient owner, yet in this case it is the right of the dominant owner which is the prominent feature in the easement, not the obligation of the servient owner.⁽³⁾

An easement being a fragment taken from the whole of an owner's proprietary rights of enjoyment of his immoveable property, it follows that the legal power or legal incompetence of an owner to create an easement over his property by grant or by covenant depends upon the alienability or alienability of the property itself.

Power to
create easement by grant
or covenant.

As, except in the case of a lessee and a married woman on whom property has been settled, persons holding any estate or interest in immoveable property cannot, if holding it under any transfer *inter vivos* or any testamentary disposition, be

(1) *Krishna v. Rayappa Shanbhaga*, 4 Mad. H. C. R. 98.

(2) In *Dalton v. Angus*, L. R., 6 Ap. Ca. 782, Bowen, J., said, "The form in which the presumption built upon a twenty years' enjoyment has usually been framed, is that of a lost grant or covenant, according as the right claimed is to an affirmative or a negative easement."

(3) As, however, all easements, negative as well as positive, are rights, a covenant creating a negative easement, in a deed, would, I apprehend, as transferring a right to the covenantee, operate as a transfer or conveyance for the purposes of the Transfer of Property Act, the Registration Act and the Stamp Act. It is clear that a covenant may operate as a grant: see *per* Lord BLACKBURN in *Russell v. Watts*, L. R., 10 App. Ca., p. 611.

under any restriction depriving them absolutely of the power of alienating the property to the extent of their interest therein,⁽¹⁾ it follows from this section that they must, except in the exceptional instances mentioned, have a co-extensive power of creating easements over such property.

Grant partly valid and partly void.

As a transfer of immoveable property may be illegal and void in part, but legal and, if capable of being divided, valid in part, so a grant of an easement may be in part, but not wholly, illegal and invalid, and may hold good to such extent as it is not illegal.⁽²⁾

Grant by a person having no title but afterwards acquiring it.

As a person who, professing to be entitled to do so, makes what purports to be a transfer of immoveable property, to which he has no title, is bound by the transfer, if he subsequently acquires a title to the property,⁽³⁾ so, it follows from this section, if a person professes to grant and to have the right to grant an easement over property, to which he has at the time no title, the grant takes effect, if he subsequently acquires a title to the property.⁽⁴⁾ He is estopped from denying the right of the grantee which he had himself professed validly to grant him.

Grant implied from terms of instrument.

And if an instrument of transfer of immoveable property contains such a description of the property as implies that there is annexed to it an easement over other immoveable property of the grantor, the grantor is estopped from denying that such an easement was granted. Thus where a lease of land described the land demised as abutting, on the north and east, upon strips of land of the lessor, which were described as newly-made streets, and which in a plan endorsed on, and referred to in, the lease, were distinctly delineated and marked "new streets;" but in reality, at the time of the

(1) See Transfer of Property Act, s. 10; Co. Lit. 206 b, 223 a; 2 Jarman on Wills, 14, 22 (4th ed.); *Broughton v. Mercer*, 14 Beng. L.R., 442; *Ananthatirtha Chariar v. Nagamuthu Ambalagaren*, I.L.R., 4 Mad. 200; *Hussain Khan Bahadur v. Nateri Srinivasa Charlu*, 6 M.H.O.R. 356.

(2) *Attorney-General v. Corporation of Plymouth*, 9 Beav. 67.

(3) See Act IV of 1882, s. 43.

(4) And see observation of WATSON, B, in *Rowbotham v. Wilson*, 8 E. & B. p. 145; and Evidence Act, s. 115.

lease, the strip of land on the east side was a piece of rough waste ground and for the most part impassable as a road, and the strip on the north was indistinctly marked out as a street or intended street, and they remained in this condition up to the time of the action; it was held that the lessor "was estopped from denying that the strips of land were what he described them to be, *viz.* 'streets,' which they could not be unless there was a way through and along them," and that the lessee was entitled by implied grant to such right of way.⁽¹⁾

B, the owner in fee simple of a piece of land, Three-acre, by deed did "covenant and grant with and to" A, "his heirs and assigns," that it should be lawful for A, his heirs and assigns, and his and their agents and servants, and the tenants and occupiers for the time being of a certain adjoining piece of land, Blackacre, and all persons going to and from Blackacre with their express or implied permission, to use a right of footway at all times thereafter across Three-acre from a public road to Blackacre and *vice versa*. At the time of this covenant and grant A was only tenant from year to year of Blackacre, but in the next following year he acquired the fee simple in it. It was held that A's right to the way was not confined to the period of the continuance of the limited interest which he had in Blackacre at the time of the grant of the easement, but that, on the true construction of the deed, the right of way was to subsist so long as A or his heirs or assigns held any interest in Blackacre, and that therefore the defendant, who was a lessee of Blackacre under one who held the fee simple therein as successor in title to A, was entitled to the right of way.⁽²⁾

A stipulation in a mining lease, or in a grant of subjacent minerals, empowering the lessee, or grantee, to enter upon the surface to search for, win and carry away the minerals in or under the land, and to erect all such buildings and

Grants of minerals and mining rights, grantor retaining surface. Question whether right to let down surface granted by terms of instrument.

(1) *Espley v. Wilkes*, L.R., 7 Ex. 298; see also *Roberts v. Karr*, 1 Taunt. 495; *Harding v. Wilson*, 2 B. & C. 96.

(2) *Rymer v. McIlroy*, L.R., 1897, 1 Ch. 528.

machinery and do and execute all such acts, works and things upon, in or under the premises as shall be necessary or convenient for working and carrying away the same; making reasonable compensation to the lessor, or grantor, for any damage which may be done to the surface land by the exercise of such powers; does not empower the lessee, or grantee, in working the minerals, to let down the surface, subject only to the liability of making compensation for damage occasioned thereby: in other words, the right of the lessor, or grantor, to support of his surface land, or, in the case of his having acquired a right of support to buildings thereon, to support of the surface and buildings, is not affected by the grant of such powers.⁽¹⁾ The powers granted by such language are only for the purpose of effectually working the minerals. The right to support of the surface to which a proprietor of the surface and the subjacent strata who has made a grant or lease of the minerals, is impliedly entitled may of course have been parted with, but to enable a Court to hold that he has parted with it, it must appear clearly from the instrument of grant or lease, either in express terms or by necessary implication, that he has done so.⁽²⁾

**Implied
grants.**

A grant of an easement may be implied from the purpose and intent with which land or other immoveable property is transferred.⁽³⁾ If an owner of land transfers, on sale, lease or otherwise, the surface soil or uppermost stratum of the land, on which a house or other building or structure is fixed, or for the purpose of a building, structure or work being erected or constructed thereon, and retains the subjacent land, the transferee (unless there is an express provision in the instrument of transfer to the contrary) becomes thereby

(1) *Davis v. Treharne*, L. R. 6 App. Cas. 460; *Greenwell v. Low Beechburn Coal Co.*, L.R. 1897, 2 Q.B. 165.

(2) *Heat v. Gill*, L.R. 7 Ch. App. 699; *Taylor v. Shafto*, 8 B. & S. 228; *Davis v. Treharne*, L.R. 6 App. Cas. 467, 469 (*per* Lord Blackburn and Lord Watson).

(3) *Caledonian Railway Co. v. Sprot*, 2 Macq. 449. And see dicta of Bowen, L.J., in *Bayley v. Great Western Ry. Co.*, L.R., 26 Ch. D. at p. 452, 453.

entitled, by implied transfer, to a right of support for such building or structure from the subjacent land of the transferor, and also from the adjacent land (so far as support therefrom may be necessary), if the transferor is the owner of that also.⁽¹⁾ And this rule, a rule of the English common law, applied to the case of a transfer, whether voluntary or compulsory under a Statute, by a landowner of the surface soil to a railway company for the purpose of constructing a railway thereon,⁽²⁾ until the relation between the transferor and the transferee railway company, in such a case, was altered by the Legislature. The Railways Clauses Consolidation Act of 1845 ⁽³⁾ introduced a new law, by its 77th and eight next following sections, which have been made applicable to the great majority of railways constructed since that Act came into force (by incorporation in their Special Acts). Under this law, a railway company purchasing land for the purpose of the railway does not become entitled to the subjacent minerals except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased. If the owner of the subjacent mines or minerals is desirous of working them, he is to give thirty days notice to the company of his intention to do so, and if the company considers that such working is likely to damage the works of the railway, and is willing to make the owner compensation (to be settled by agreement or, failing that, in manner prescribed by the Act) for the mines or minerals or any part thereof, he shall not work or get the same. But if, in such case, the company do not within such thirty days state their willingness to treat with the owner for such compensation, he is at liberty to work the mines or any part

(1) To the support of the surface soil in its natural state, *i.e.*, apart from any weight artificially added to it, the transferee is of course (in the absence of a contract and consequent provision in the conveyance to the contrary) entitled as of natural right.

(2) *Caledonian Railway Co. v. Sprot*, 2 Macq. H.L., 449; *Elliot v. N. E. R. Co.*, 10 H.L.C. 333. And see *L. & N. W. R. Co. v. Evans*, L.R. 1893, 1 Ch. at p. 27 (*per* Bowen, L.J.)

(3) 8 & 9 Vict. c. 20,

thereof for which the company shall not have agreed to pay compensation, provided that "the same be done in a manner proper and necessary for the beneficial working thereof and according to the usual manner of working such mines in the district where the same shall be situate." (1) These provisions are very beneficial to railway companies, while at the same time they are just and advantageous to the owners from whom land is taken for the purposes of a railway under compulsory powers. The railway company is not bound to buy the mines as well as the surface, while it is allowed opportunity and option of preventing the working of so much of the mines and minerals as it may deem necessary for the support of its works, by payment of compensation therefor. "As regards mines," said *Lindley*, L.J., "the railway company have nothing to do with them until the time comes when the owner wants to work them so as to endanger the railway. It may never come at all. They may be minerals which cannot be worked at a profit, or so situate as not to be worth working, and in such a case the railway company get the right of support for nothing." (2) The landowner, on the other hand, is not bound to sell more of his land than such surface land as is requisite for the construction of the railway works, (3) and he retains the subjacent minerals and mines and also the right to work them, except to such extent as the company may exercise their power of preventing him from so doing by paying him compensation for them. In the event of the railway company not electing, within the thirty days allowed them, to pay the mine-owner compensation, he is entitled to proceed to work the minerals according to the proper and customary mode of working them, even so close to the surface soil as to cause the destruction, by subsidence,

(1) s. 79 of the Act.

(2) *Ruabon Brick & Terra Cotta Co. v. G. W. R. Co.*, L.R. 1893, 1 Ch. at p. 454.

(3) Strictly speaking, what the railway company buys is all the surface land and all below it which is not mines or minerals; see s. 77 of the Act, and *per Bowen*, L. J., in *Ruabon Brick & Terra Cotta Co. v. G. W. R. Co.*, L.R. 1893, 1 Ch. at p. 457.

of the permanent way or other works of the railway.(1) And where the mineral is one, such as, e.g., clay, which according to the usual manner of working it in the district, is won by digging downwards from the surface and quarrying, and not by underground working, the mine-owner is entitled, on such non-election by the company to pay compensation, to enter upon the surface land and win the mineral by such digging and quarrying, although this involve removal of the rails, sleepers, ballast, or any other works of the railway, and the surface soil lying above such mineral.(2) In considering what passed, on a transfer of property, by the transfer, it may be permissible to take evidence as to the state of the property at the time of the transfer, and the mode in which it was enjoyed by a person who held it as transferee under the same transferor immediately before the present transferee and who used it for the same purpose as the present transferee; provided that such state of the property and such mode of enjoyment were known to the transferor at the time of the transfer. S, the owner of two mills, in 1855 leased one of them to P, who carried on therein the business of a bleacher. The refuse from his works was discharged, through a drain, into a natural stream, upon which S's other mill was situate, and polluted the stream. In 1858 P surrendered his lease to S, and S granted a new lease of the same mill (the subject of P's lease) to the defendant. The defendant was described in his lease as a "bleacher." The defendant carried on the bleaching business in this mill, and discharged the refuse from his works through the drain into the stream in the same manner as P had done. It was held that evidence was admissible as to the state of the premises at the time of the lease to the defendant, and as to the mode in which the premises had been enjoyed by P, and that

(1) *G. W. R. Co. v. Bennett*, L.R. 2 H.L. 27.

(2) *Ruabon Brick & Terra Cotta Co. v. G. W. R. Co.*, L.R. 1893, 1 Ch. 427. Minerals usually worked by open or surface operations had been previously held to be included in "mines of coal . . . or other minerals" in s. 77 and "mines or minerals" in s. 78, by the House of Lords in *Midland R. Co. v. Robinson*, L.R. 15 App. Cas. 19; 37 Ch. D. 386.

as it was proved that S had granted the lease of the mill to the defendant, for the purpose of bleaching, with the full knowledge that P had been using the stream for the purpose of carrying off his refuse and thereby polluting it, he had impliedly granted to the defendant the right similarly to discharge refuse into and pollute the stream, and that the plaintiff, who had purchased the other mill from S and carried on therein the business of paper-making, could not maintain an action against the defendant for pollution of the stream.⁽¹⁾

When a lease of land, adjoining other land of the lessor, was granted in order that the leased land might be used by the lessee for the purpose of carrying on the business of a timber merchant, the person who had purchased from the lessor the adjoining land was held to be under an implied obligation to which the lessor had been subject to abstain from doing anything which would substantially interfere with the lessee carrying on the said business in the ordinary course, and was therefore under the obligation not to erect buildings on his land which would interrupt the passage of air over that land to sheds upon the leased land used by the lessee for seasoning timber ; though such passage of air was a passage of undefined air and was therefore of such a character as that a right to it could not be acquired by user.⁽²⁾

By s. 19 of this Act, and by s. 8 of the Transfer of Property Act, on any transfer of immoveable property, the existing easements (if any) annexed to the property pass to the transferee by force of the transfer itself of the property, unless a contrary intention is expressed or necessarily implied.

As to implied grants and re-grants (or reservations) of easements of necessity, and of continuous and apparent easements, on the severance of two tenements theretofore united, see Sec. 13 and commentary thereon. As to presumed or implied grants of easements, where the presumption is founded upon long enjoyment, see note to Sec. 15.

(1) *Hall v. Lund*, 1 H. & C. 678.

(2) *Aldin v. Latimer Clark, Muirhead & Co.*, L. R., 1894, 2 Ch. 437.

A reservation to himself, by the grantor of an easement, of the same right of user which he has granted (as an easement) to the grantee may be implied by the terms of the grant.⁽¹⁾

Implied reservation.

A tenant may acquire an easement against his landlord by grant, or covenant, express or implied. In *Kristna Ayyan v. Venkatachella Mudali*⁽²⁾ the plaintiffs, who were the ryots of a village holding their lands under the Government by tenancy from year to year, had for very many years received their supply of water for irrigation and other purposes from a certain channel situate in other land, which belonged to the Government. Recently the Government had diverted some of the water of the channel for the purpose of supplying other villages. It was found on the evidence that the diversion caused no diminution in the supply which the plaintiffs had previously received, and that there was no ground for apprehending such a diminution. The plaintiffs, however, claimed a right to prevent the Government from causing any diminution of the water of the channel, whether it caused diminution of the supply to the plaintiffs' village or not. It was held that there was an implied grant by Government to the plaintiffs of a right to such a supply of water from the channel as existed at the time when the lands were let to them by Government, but to no more than this. INNES, J., said, "In letting irrigable land with existing conveniences for the supply of water for the purposes of irrigation, the landlord, no doubt, impliedly engages, if nothing to the contrary is expressed, that the existing arrangements for the supply of water will not be interfered with to the prejudice of the tenant during the continuance of the tenancy; and as the plaintiffs' tenancies are from year to year, it may be taken that this engagement is yearly renewed."⁽³⁾ Where a landowner had granted land for building purposes to *fazendari* tenants on a perpetual tenure at a quit-rent, and the evidence showed that

Grant or covenant by landlord or tenant.

(1) *Vishnu v. Rango Ganesh Purandare*, I. L. R., 18 Bom. 382, 387.

(2) 7 Mad. H. C. R. 60.

(3) 7 Mad. H. C. R. 64. See also Judgment of INNES, J., in *Venkata Reddy v. Lister*, 7 Mad. H. C. R. 346.

a certain vacant piece of ground belonging to the *fazendar* and close to the land so granted had as far back as the memory of living witnesses went been used by the *fazendari* tenants in divers ways for the more convenient occupation of their surrounding houses, without permission of the *fazendar* being asked for or given, the Court presumed a covenant on the part of the *fazendar* to keep it open for the use of the tenants.⁽¹⁾

Grant by
lessee.

A lessee can grant an easement burdening the tenement of which he is lessee, to the extent of the term of his lease; and if he makes such a grant, neither he nor any one claiming under him can defeat the easement by surrendering the lease: the surrenderee, the lessor, would be bound by the easement until the expiration of the term of the lease.⁽²⁾ Such a grant can be made by one of two lessees holding different tenements under the same landlord to the other lessee.⁽³⁾ Though such a grant cannot be presumed by means of the fictitious presumption of a lost grant, it can be presumed if there is evidence justifying the inference that such grant was, as a fact, made. In *Bright v. Walker*,⁽⁴⁾ the Court of Exchequer in their judgment, speaking of a grant of an easement by one of two lessees under the same landlord to the other, said: "Of course, nothing that has been said by the Court, and certainly nothing in the Statute (the Prescription Act), will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or, upon proof of its loss, by secondary evidence; nor prevent the jury from taking the possession into consideration, with *other circumstances*, as evidence of a grant, which they may still find to have been made, if they are satisfied that it *was made in*

(1) *Ranchordass Amthabhai v. Maneklal Gordhandass*, 1 L. R. 17 Bom. 648. See also *Moody v. Steggles*, L. R. 12 Ch. D. 261; *Lancaster v. Eve*, 5 C. B. (N. S.) 717; *Aldin v. Latimer Clarke, Muirhead & Co.*, L. R. 1894, 2 Ch. 437.

(2) *Wheaton v. Maple & Co.*, L. R. 1893, 3 Ch. 48, 62; *Doe v. Pyke*, 5 M. & S. 146; *Piggott v. Stratton*, 1 D., F. & J. 33.

(3) See *Illust. (d)* to this section; *Bright v. Walker*, 1 C. M. & R. at p. 222.

(4) 1 C. M. & R. 211, at p. 222.

point of fact." And in *Wheaton v. Maple & Co.*, LINDLEY, L. J., in his judgment, says, that although such a grant by a lessee, "commensurate with his lease, might be inferred as a fact, if there was evidence to justify the inference, there is no legal presumption, as distinguished from an inference in fact, in favour of such a grant"(1); and, further on, he says: "Such easements" (*viz.* the easements "for a limited time only, or available only against particular owners or occupiers of the servient tenement," just before mentioned) "can only be created since the Act as before the Act—*viz.* by grant or by an agreement enforceable in equity, which for most purposes is as efficacious as a deed under seal. Such a grant or agreement must, moreover, be proved as a fact and not be purely fictitious."(2)

Where land, or houses or other buildings, are granted "with the appurtenances," easements already existing at the time of the grant, annexed to the property granted, pass to the grantee by those words,(3) but, ordinarily and according to the technical meaning of the term "appurtenances" in English law, no easement over other land of the grantor is carried (or, rather, created) by those words, and therefore a right to a way, to and from the property granted, which way was before and up to the time of the grant used by the grantor, over adjoining land of his own, does not ordinarily pass to the grantee by those words, even though the way is over a made road.(4) Hence, where there was a contract for the sale of a piece of land and houses thereon "with the appurtenances," it was held that the purchaser was entitled to have only such general words inserted in the conveyance as would carry easements already existing (such as "all ways," &c., "rights and appurtenances thereto belonging"), and not such general words as "enjoyed with" or "reputed to ap-

Construction
of instruments
of conveyance.
—General
words.

(1) L. R. 1893, 3 Ch. at p. 63.

(2) L. R. 1893, 3 Ch. at p. 65.

(3) *Whalley v. Thompson*, 1 Bos. & P. 376; 4 R. R. 832 (Judgment of EYRE, C. J.)

(4) *Bolton v. Bolton*, L. R., 11 Ch. D. 968; *Whalley v. Thompson*, 1 Bos. & P. 371; 4 R. R. 826.

pertain to," which would carry—as newly created easements—what had been enjoyed as *quasi*-easements by the vendor or his tenant for the benefit of the property granted over other property of the vendor, and that therefore a proviso must be inserted in the conveyance excluding the operation of Sec. 6 of the Conveyancing and Law of Property Act, 1881,(1) which provides that if and so far as a contrary intention is not expressed in the conveyance, a conveyance of land, with or without houses thereon, shall be deemed to include and shall operate to convey (*inter alia*) all ways, water-courses, liberties, privileges, easements, rights and advantages whatsoever reputed to appertain to, or at the time of the conveyance enjoyed with, the land or any part thereof.(2) But where a lease was granted of a tenement, for the benefit of which a right of way over adjoining land of the lessor had been reserved under a lease of that land previously granted, the right of way was held to pass under the word "appurtenances" in the first-mentioned lease.(3) The Court of Appeal, in their judgment, said: "No doubt the word "appurtenances" is not apt for the creation of a new right, and the word "appurtenant" is not apt to describe a right which had never previously existed; and therefore the mere grant of all appurtenances or of all ways appurtenant to the principal subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing at the date of the grant. But from as long ago as the 4th year of Philip and Mary, (*Hill v. Grange*)(4) the word "appurtenances" has easily admitted of a secondary meaning, and as equivalent in that case to "usually occupied." (5) And where the tenant of a farm who had under the terms of his lease a right of common of pasture on waste land of his lessor, the lord of the manor, obtained, during his tenancy and while he was still enjoying the right of common, a con-

(1) 44 & 45 Vict., C. 41.

(2) *In re Peck and School Board for London*, L. R. 1893, 2 Ch. 315.

(3) *Thomas v. Owen*, L. R., 20 Q. B. D. 225.

(4) *Plowd.* 170.

(5) L. R. 20 Q. B. D. 231, 232.

veyance from the lord purporting to convey to him in fee simple the farm with the common of pasture "thereunto belonging or in any wise appertaining," it was held, having regard to the relation of the parties *inter se* and the circumstances of the case at the time, that the general words used ought to be construed as equivalent to "therewith actually used and enjoyed," constituting a grant *de novo* of the right of common, which by the merger of the lease in the reversion would have otherwise ceased to exist.⁽¹⁾ But where a portion of the lands of a farm, the entirety of which was and had been for many years in the occupation of successive lessees of the lord of the manor, who had exercised rights of common granted to them by their leases over the waste lands of the lord, was granted by the lord of the manor, "together with all ways, . . . commons, and all other rights, members, and appurtenances whatsoever to the said piece of land or any part thereof belonging," not to the lessee of the farm, but to a stranger, it was held that there were no special circumstances, such as there were in *Doidge v. Carpenter*, requiring that a construction different from the ordinary one should be put on the general words, and that no right of common passed to the grantee.⁽²⁾ Where a deed of grant contains certain ordinary general words, under which, if taken in their strict grammatical meaning, an easement would pass to the grantee, this inference may be rebutted by the surrounding circumstances which existed at the date of the grant.⁽³⁾ In *Chunder Coomar Mookerji v. Koylash Chunder Sett*⁽⁴⁾ WILSON, J., laid down the following propositions: "The words 'appurtenant' or 'belonging' will ordinarily carry only actually existing easements, and therefore will carry no right over the land of the grantor (*Whalley v. Thompson* ;⁽⁵⁾ *Barlow v. Rhodes* ;⁽⁶⁾

(1) *Doidge v. Carpenter*, 6 M. & S., 47; 18 R. R. 299.

(2) *Baring v. Abingdon*, L. R., 1892, 2 Ch. 374.

(3) *Roe v. Siddons*, L. R., 22 Q. B. D. 224.

(4) I. L. R., 7 Cal. 665, 670; confirmed on appeal, I. L. R., 8 Cal. 677.

(5) I. Bos. & P. 371; 4 R. R. 826.

(6) 1 C. & M. 439.

Pheysey v. Vicary(1); though it would seem that under certain circumstances even these words might have a wider construction (*Morris v. Edgington*(2)). Where further words are used, such as those in this deed, 'therewith held or used,' the case is different. Those words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession (*James v. Plant*(3)). On the other hand, such words will not carry a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly (*Thomson v. Waterlow*(4); *Langley v. Hammond*(5)). Where again, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards erected, the authorities shew that the words in question are large enough to carry it (*Kooystra v. Lucas*(6); *Watts v. Kelson*(7); *Kay v. Oxley*(8))." To the cases cited by WILSON, J., in support of this last proposition may be added *Barkshire v. Grubb*(9) and *Bayley v. Great Western Railway Company*.(10)(11) In regard to the cases of *Thomson v. Waterlow* and *Langley v. Hammond* cited by WILSON, J., in support of the penultimate proposition here laid down by him, it is to be observed that in so far as these two cases are, if, rightly read, they can be taken to be, authorities for the proposition that general words such as "together with all ways therewith now used or enjoyed," in a conveyance of one of two tenements by the owner of both, will not carry a way used by such owner for the benefit of the tenement conveyed over the other tenement, even where the way is over a defined

(1) 16 M. & W. 484.

(2) 3 Taunt. 24.

(3) 4 A. & E. 749.

(4) L. R. 3 Eq. 36.

(5) L. R. 3 Exch. 161.

(6) 5 B. & Ald. 830.

(7) L. R. 6 Ch. 166.

(8) L. R., 10 Q. B. 360.

(9) L. R. 18 Ch. D. 616.

(10) L. R. 26 Ch. D. 434.

(11) And in *Whalley v. Tompson*, 1 Bos. & P. 371; 4 R. R. 826, ERLE C. J., in judgment said: "Had the devise been 'with the way now used' it would certainly have been a devise of the close with an easement newly created."

and formed road, unless it had existed as a right before the unity of possession of the two tenements, they have been overruled by *Kay v. Oxley*.⁽¹⁾ The effect of the decision in that case and the other cases cited in footnote (1) below is that if the way is a definite and formed roadway and has been during the unity of possession of the tenements used as a way for the benefit of the tenement alienated, the grant of the latter tenement "with all rights usually enjoyed therewith" or "with all rights appertaining thereto," or with other like words, will carry the right of way, whether such right existed before the unity of possession of the two tenements or not. The decision in *Thomson v. Waterlow* was not, in the opinion of the Court of Queen's Bench in *Kay v. Oxley* and that of BRAMWELL, B., in *Langley v. Hammond*, to the effect of the proposition which it has been relied on as laying down.⁽²⁾ The sense in which BLACKBURN, J., in *Kay v. Oxley*, understood the judgment of Lord ROMILLY, M. R., in *Thomson v. Waterlow*, is shewn in the following passages of the judgment of the former learned judge: "I think whenever it appears that an alleged right of way had been used for the convenience of the person who held both tenements, which convenience ceased to exist when a severance took place, it is a good rule to adopt to say that the way was not used or enjoyed as appurtenant to the premises—it was used for the convenience of the man who was the occupier of the two, and when he ceases to be the occupier of the two, I think it is no longer appurtenant. That, I think, is a sound rule. And though the facts of the case before the MASTER of the ROLLS [in *Thomson v. Waterlow*] are not set out, I presume they were such as to shew that the right of way said to pass was for the convenience of the person so long as he was the

(1) L. R. 10 Q. B. 360. See also *Bailey v. Great Western Railway Co.*, L. R. 26 Ch. D. 434; *Barkshire v. Grubb*, L. R. 18 Ch. D. 616; *Watts v. Kelson*, L. R., 6 Ch. App. 166.

(2) See judgments of BLACKBURN, J., and LUSH, J., in L. R. 10 Q. B., 366, 370, and of BRAMWELL, B., in L. R., 3 Ex. 170.

occupier of the whole premises to which and over which the way went. Looking at it in that view, it would seem to have been a sound enough decision.”⁽¹⁾ And again: “I quite agree, where there is a track across the middle of a stack-yard, and the owner sold one side of the stack-yard to enable the purchaser to throw it into his pleasure-grounds, that track across the middle of the stack-yard would not, to use the words of the MASTER of the ROLLS, be a right of way appurtenant to every portion of the stack-yard, but a right of way solely for the convenience of the person who held the whole stack-yard, and which convenience ceased to exist when he severed one part of the stack-yard from the other. That is a good and sound distinction, and taking it in that way, which is the point MARTIN, B.,⁽²⁾ went upon, I think the decision is perfectly good and right.”⁽³⁾ Even in *Langley v. Hammond*, though the judgment of KELLY, C.B., did certainly enunciate the proposition, for which that case and *Thomson v. Waterlow* have been relied upon in arguments in subsequent cases as authorities, but which has been since condemned as unsound, one of the judges, BRAMWELL, B., declined to decide the case upon the basis of that proposition being the law, and based his judgment upon another ground, viz., that there was no defined road, but only a yard where the occupier of the premises before the severance could and did go in any particular direction he desired.⁽⁴⁾ As pointed out by FRY, J., in *Barkshire v. Grubb*,⁽⁵⁾ according to the older authorities no such distinction as that drawn or supposed to have been drawn by the decisions in *Thomson v. Waterlow* and *Langley v. Hammond*, existed.⁽⁶⁾ The observations of BLACKBURN, J., in *Kay v. Oxley*, above quoted, serve to show how the penulti-

(1) L. R. 10 Q. B. 366.

(2) i. e. in *Langley v. Hammond*. See L. R. 3 Ex. 170.

(3) L. R. 10 Q. B. 367.

(4) L. R. 3 Ex. 171.

(5) L. R. 18 Ch. D. 621.

(6) See Comyn's Digest, tit. "Chimin"; *Kooystra v. Lucas*, 5 B. & A. 830, 834.

mate proposition of those stated by WILSON, J., in the above-cited passage of his judgment in *Chunder Coomar Mookerji v. Koylash Chunder Sett* is distinguishable from his last proposition there stated. The proposition, established by the decisions as law, that where a property is granted in respect of which, at and before the time of the grant, the grantor or his tenant used a way over a defined path or road made across adjoining property of his which he retains, and the instrument of grant contains the general words "together with all ways therewith used or enjoyed," or like words, denoting not a right of easement but *de facto* enjoyment only, a right of way over such path or road is created in favour of the grantee, whether such a right existed before the unity of possession of the two properties or not, holds good even when the grantee is a railway company and the way is used by the company for a purpose other than the actual purposes of the railway. In *Railey v. Great Western Railway Co.*⁽¹⁾ the railway company, under their statutory powers, purchased from the plaintiff a portion of certain land of which the plaintiff was the proprietor. Many years previously the plaintiff's predecessors in title had built stables on the portion of the land purchased by the railway company and since then up to the time of the purchase by the railway company they and the plaintiff or his tenant had used as the access to these stables a private road which they had made across the other portion of the land from a public highway to the stables. By the conveyance to the company the piece of land and stables thereon purchased were granted "together with all buildings . . . rights, members, and appurtenances whatsoever to the said [premises] belonging or in anywise appertaining or deemed, taken or known, held, occupied or enjoyed as part, parcel or member thereof." It was held that the company were entitled to a right of way over the private road to and from the stables so long as they lawfully used the stables as stables, which they could do until they either applied the stables and site

(1) L. R. 26 Ch. D. 434.

thereof to the proper purposes of their railway or sold them as superfluous land. Where an instrument of transfer of property contains such general words as confer on the transferee an easement over other property of the transferor from which the property transferred is severed, if the easement is a continuous and apparent one and was enjoyed as a *quasi*-easement immediately before the severance took place, the transferee becomes entitled to it by the mere transfer of the property apart from any general words, as well as by force of the general words in the instrument; under the law of India obtaining where this Act is not in force, as well as under sec. 13 of this Act (as he does under the English law). Accordingly in a Bombay case decided long before this Act came into force there, (1) in which by a deed of partition of certain land and houses the several shares were conveyed "together with all the rights, easements and appurtenances to or with the same . . . belonging or reputed to belong or enjoyed", it was held that both by implication of law and by the general words of the conveyance a grantee of one of the shares acquired easements of light and air over land which went to another sharer under the deed, such light and air having been enjoyed for the former tenement over the latter tenement before and up to the time of the severance of the ownership and possession of two tenements. Where by a Marathi deed of sale a plot of land was conveyed and with it "all rights and accompaniments excepting treasure-trove," it was held that these general words did not of themselves, apart from the circumstances at the time of the sale, pass to the purchaser a right of way over the vendor's adjoining land, but that they might have that effect if at the time of the sale there was an old path leading across the vendor's land to the plot sold, and the purposes for which the plot was sold and the conduct of the parties were such as to justify an inference that by the use of these words such right was intended to be conveyed. (2) As to the case

(1) *Bottlewalla v. Bottlewalla*, 8 Bom. H. C. R., O. C., 181, 185.

(2) *Municipality of City of Poona v. Vaman Rajaram Gholap*, I. L. R. 19 Bom. 797.

of easements of way being created in favor of a grantee of a tenement over another tenement of the grantor by implied grant, without any general words in the instrument of grant, where the way is over a pre-existing formed road, see note to sec. 13.

Care should be taken by the draftsman, in wording a grant of an easement, not to use such terms as will have the effect of granting, not the easement which was intended, but some larger powers of user over, or even the absolute property in, the tenement, or the portion thereof, over which the easement was intended to be created. In *Reily v. Booth* (1) by deed certain land and buildings were conveyed in fee together with the exclusive use of a covered passage (called a "gateway"), the dimensions of which were given; it was held that the deed conveyed to the grantee a right to use the passage for other uses besides that of a way, and probably (though it was not necessary to decide as to that) conveyed the property or ownership of the passage. The words "The exclusive use of the said gateway" were, said LINDLEY, L. J. (2), very different from the words "the exclusive right of gateway" in the case of *London Tavern Co. v. Worley*. (3) Questions have often arisen whether the terms of a grant do not amount to a grant of the soil or part of the soil itself, and not merely a right to do something in or in respect thereof. Thus a grant of all the coal in or under certain land carries a right of property in the veins or seams of coal, i.e. part of the soil itself; but a grant of a right to mine in or under certain land and take therefrom coal carries no right to any stratum or part of the soil, but is either an easement, or a license, (as the case may be) (4). So also, of course, in the case of reservations (or regrants.) (5)

(1) L. R., 44 Ch. D. 12.

(3) Not reported.

(2) L. R., 44 Ch. D. 24.

(4) *Wilkinson v. Proud*, 11 M. & W. 33; *Stoughton v. Leigh*, 1 Taunt. 402.

(5) See *Duke of Sutherland v. Heathcote*, L. R., 1892, 1 Ch. 475; L. R., 1891, 3 Ch. 504. But in a case under the Scotch law, a reservation, in a deed of grant of land, of "liberty of working coal" in the land disposed, was held by the House of Lords to be a reservation of the property in the coal: *Duke of Hamilton v. Dunlop*, L. R., 10 App. Cas. 813.

If in an instrument of transfer of immoveable property a privilege exercisable over certain other immoveable property of the transferor is granted to the transferee, and it appears from the terms of such grant that the privilege was intended to be ancillary to the use of the property transferred, it cannot, of course, be successfully contended that the privilege was not granted as an easement but as a mere license.⁽¹⁾

Illustration (c) The converse of the case given in *Illustration (c)* is legally possible, i.e. one of two or more co-owners can acquire an easement for the co-owned property without the consent of the other or others; see Sec. 12.

Grant by
Crown of private fishery in tidal navigable waters.

In *Prosunno Coomar Sircar v. Ram Coomar Paroory*⁽²⁾ MARKBY, J., expressed doubt whether the Crown could grant to a riparian owner a private right of fishery in rivers (or, as it might have been more accurately put, the portions of rivers) which are tidal and navigable by the public, but it was not necessary in that case to decide that question. He held that if such a right could be acquired at all, it must be derived from the Crown, and that it lay on the person claiming such right to establish it by very clear evidence; and he found that the plaintiff had failed so to establish it.

Servient owners.

9. Subject to the provisions of section eight, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Illustrations.

(a) A has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of B's stream. B may grant to C the right to divert the water

(1) *Vishnu v. Rango Ganesh Purandare*, I. L. R., 18 Bom. 382, 386.

(2) I. L. R., 4 Cal. 53.

of the stream from noon to sunset: provided that A's supply is not thereby diminished.

(b) A has, in respect of his house, a right of way over B's land. B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: provided that A's right of way is not thereby obstructed.

Commentary.

This section relates only to grants of second or subsequent easements not in derogation of pre-existing easements over the same land. But such a second, or subsequent easement, may be acquired by prescription also; or by custom; (though there is no provision to that effect in this Act). In *Rolle v. Whyte*⁽¹⁾ the owners of a mill situated on one side of the river had, from time immemorial, used a dam which extended diagonally across the stream from the mill to an island near the opposite bank, the effect of which was to turn the body of the water of the stream to the mill. R, the riparian proprietor of the land on the opposite side of the river, had, about 60 or 70 years before the suit, cut an opening through the said island, for the purpose of improving a fishing weir which he had, the effect of which was to let a portion of the water escape which must otherwise have gone to supply the mill, and this diminution of the water was sufficient when the river was low to interfere with the working of the mill. The use of this opening had been habitually stopped by the miller whenever it would have so interfered with the working of the mill. But it had not been interrupted by other riparian owners on either side of the river. It was held that R was entitled to an easement consisting of the right to use the opening for the purpose of his weir, except so far as it interfered with the exercise by the mill-owner of his easement. The Court said, in their judgment,⁽²⁾ "We think that there is nothing to prevent a second easement being acquired, as subordinate to one already existing, where the subject-matter

(1) L. R., 3 Q. B. 286.

(2) L. R., 3 Q. B. 302.

admits of it. If the other riparian owners on the stream had granted to the appellant to have a weir for the purpose of taking fish at such times as the whole body of the stream was not needed for the working of the mill, such a grant would have been perfectly good, and would have conferred an easement *pro tanto*: we see no reason why such a qualified easement should not be acquired by user for the time required to confer easements in respect of water." In *Gaved v. Martyn*⁽¹⁾ it was held that an easement could be acquired by a person by prescription in a stream, subordinate to certain existing easements of other persons, based on custom, in the same stream. In short, two or more easements owned by different persons over the same servient tenement may co-exist, and be acquired either by grant, prescription, or custom, or, it seems, one of them in one of these ways, and the other or others in another of these ways, provided always that such easements do not clash or conflict with one another. The principle is the same in the case of rights in gross. In *Ashraf Ali v. Jagan Nath*⁽²⁾ the plaintiffs, inhabitants of a *mahalla* (quarter of a town), claimed and proved a right in themselves, but not as appurtenant to any dominant tenements, and existing by virtue of a custom, to use at the time of the Holi festival a piece of waste land, belonging to certain third persons, for the purpose of burning the Holi and performing certain ceremonies thereon. The defendants claimed a right to place tazias upon this piece of land at the time of the Muharram. It was held that the plaintiffs' right to use the land for a few days at one period of the year did not necessarily entitle them to object to the defendants using it at another, and that in fact the laying a tazia on the land, of which the plaintiffs complained, did not interfere with their right.

Lessor and
mortgagor.

10. Subject to the provisions of section eight, a lessor may impose, on the property leased, any easement that does not derogate from the rights

(1) 19 C. B., N. S., 732.

(2) I. L. R., 6 All. 497.

of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor. Lessee.

Commentary.

The rule enacted in this section is comprehended in the general rule enacted in Sec. 8.

12. An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same. Who may acquire easements.

One of two or more co-owners of immoveable property may, as such, with or without the consent

of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immoveable property can acquire, for the beneficial enjoyment of other immoveable property of his own, an easement in or over the property comprised in his lease.

Commentary.

"Owner," in this section, would seem to be intended to mean "absolute owner."⁽¹⁾ Yet, if this is so, the section can hardly be taken to be exhaustive of the persons "who" (to use the words in the margin of the section) "may acquire easements." For, by grant or covenant, a person having a limited interest in a tenement—such as a tenant for life, or a lessee—can acquire an easement in respect of such tenement limited to the period of his (or of his or her representatives' or assigns') possession thereof, or, it may be, to only a portion of such period⁽²⁾, and in such a case the easement would appear to be in no sense acquired "on behalf of" the absolute owner of the dominant tenement.

Prescriptive easement not acquirable by tenant or other limited owner except on behalf of reversioner.

By prescription an easement can only be acquired by a tenant, or other person having a limited interest in the dominant tenement, on behalf of and in right of the landlord or other reversioner. This is so as well in the case of prescription according to the English common law as prescription under the Prescription Act.⁽³⁾ In *Ivimey v. Stocker*⁽⁴⁾, Lord CRANWORTH, L. C., in his judgment, said: "The rights of the bounders cannot be sustained on the ground of prescription, for to support a right on such a ground, the persons insisting on it must have, either in themselves or in those under whom

(1) See note to S. 4 (pp. 6, 7) as to the use of this word in this Act.

(2) See S. 6 and S. 8, *Ill. (d)*, and S. 37, *Ill. (c)*. And see *Large v. Pitt, Peake*, Add. Ca. 152; *Keymer v. Summers*, Bull. N. P. 74, cited 3 T. R. 157; *Bright v. Walker*, 1 C. M. & R. at p. 222; *Wheaton v. Maple & Co. L. R.*, 1893, 3 Ch. at p. 62, 65.

(3) 4 Rep. 31, 32; 1 Steph. Comm. 691 (10th ed.); *Udit Singh v. Kashi Ram*, I. L. R., 14 All. 185, at p. 189; *Kristna Ayyan v. Venkatachella Mudali*, 7 M. H. C. R. 60, at p. 64 (*per INNES, J.*)

(4) L. R., 1 Ch. App. 396, at p. 405.

they derive title, an estate in fee simple, and bounders certainly have no such estate." And in *Wheaton v. Maple & Co.*,⁽¹⁾ LINDLEY, L.J., in his judgment, said: "The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt by or *with*⁽²⁾ any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years." And in *Robson v. Edwards*⁽³⁾, in which one of two tenants of different tenements under the same landlord was held to have acquired under the Prescription Act, S. 3, an easement of light against the other tenant, NORTH, J., in his judgment said: "At that time, therefore, when that lease expired, the twenty years had run, and the right had become absolute and indefeasible appurtenant to that house, as it was then occupied by the plaintiff. . . . When twenty years had run, the right was acquired absolute and indefeasible in respect of the access of light to that house; and when the house was leased afterwards, the right given by law passed with it, not by reason of the lease, though, no doubt, the person who became tenant went in under the lease."

In the case provided for in the third paragraph to this section, the enjoyment of the benefit (claimed as an easement) in or over the tenement leased would not be an enjoyment by the person *as of right quâ* owner of the other tenement, and as against the owner of the leased tenement, for the former person alone has the right of possession and enjoyment of the leased tenement, and the owner of it has no such right and consequently no power to obstruct or resist the enjoyment of the benefit in question. "No action of trespass," said BACON, V. C., in his judgment in *Outram v. Maude*⁽⁴⁾ "could have been maintained by the lessor against the tenant during the demise. No action for an injunction re-

Third paragraph, S. 12.

(1) L. R., 1893, 3 Ch. at p. 63.

(2) The word "with" is not in italics in the original, but is purposely italicized here.

(3) L. R., 1893, 2 Ch. 146, 149, 150.

(4) L. R., 17 Ch. D., p. 405.

straining him from the use of the old drain could have been maintained by the landlord against the tenant during the continuance of the demise."

Easements of necessity and quasi-easements.

13. Where one person transfers or bequeaths immoveable property to another,—

(a) if an easement in other immoveable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immoveable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,—

(e) if an easement over the share of one of them

is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (a), (c) and (e), are called easements of necessity.

Where immoveable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations.

(a) A sells B a field then used for agricultural purposes only. It is inaccessible except by passing over A's adjoining land or by trespassing on the land of a stranger. B is entitled to a right of way, for agricultural purposes only, over A's adjoining land to the field sold.

(b) A, the owner of two fields, sells one to B, and retains the other. The field retained was at the date of the sale used for agricultural purposes only and is inaccessible except by passing over the field sold to B. A is entitled to a right of way, for agricultural purposes only, over B's field to the field retained.

(c) A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.

(d) A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's hands.

(e) A is the owner of a house and adjoining land. The house has windows overlooking the land. A simultaneously sells the house to B and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right to the light, and C takes the land subject to the restriction that he may not build so as to obstruct such light.

(f) A is the owner of a house and adjoining land. The house has windows overlooking the land. A, retaining the house, sells the land to B, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.

(g) A, the owner of a house, sells B a factory built on adjoining land. B is entitled, as against A, to pollute the air, when necessary, with smoke and vapours from the factory.

(h) A, the owner of two adjoining houses, Y and Z, sells Y to B, and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect, and A is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect.

(i) A, the owner of two adjoining buildings, sells one to B, retaining the other. B is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.

(j) A, the owner of two adjoining buildings, sells one to

B, and the other to C. C is entitled to lateral support from B's building, and B is entitled to lateral support from C's building.

(k) A grants lands to B for the purpose of building a house thereon. B is entitled to such amount of lateral and subjacent support from A's land as is necessary for the safety of the house.

(l) Under the Land Acquisition Act, 1870, a Railway Company compulsorily acquires a portion of B's land for the purpose of making a siding. The Company is entitled to such amount of lateral support from B's adjoining land as is essential for the safety of the siding.

(m) Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

(n) A lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right of way over that land suitable to the business to be carried on by B in the house and grounds.

Commentary.

In a note to *Pomfret v. Ricroft*⁽¹⁾, it is said: "Where a man having a close surrounded with his own land grants the close to another in fee, for life, or years, the grantee shall have a way to the close over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant." This statement of the law was cited with approval and followed by the Lord Chancellor in *Guyford v. Moffatt*⁽²⁾, in which a tenant was held to have a right of way of necessity against his landlord. And, conversely, if an alienation is made of land adjoining other land which the alienor retains, and to which no access is possible except by

Paragraphs
(a) (c) (e).
Easements of
necessity.

(1) 1 Wms. Saund, 321 n. 6.

(2) L. R., 4 Ch. App. 133.

crossing the land alienated, there is an implied reservation in favor of the alienor of a right of way of necessity over the latter land.⁽¹⁾

Where an occupant of a plot of land under fazendari tenure had encroached on a piece of the adjoining land of his landlord, which thereby in effect was added to and became part of the tenure, he was held to have a right of way of necessity as well in respect of the piece of land so added as in respect of the said plot, across the other land of the fazendar which completely surrounded both the plot and the piece of ground so added.⁽²⁾

When the tenement transferred is transferred by the transferor in the capacity of a trustee, the transferee is equally entitled to a right of way of necessity over a tenement belonging to the transferor in his own right as he would be if the latter had been beneficial owner instead of trustee of the property transferred.⁽³⁾

The law, as to easements of necessity, is the same in those parts of British India where the Easements Act is not in force.⁽⁴⁾

In order that an easement of necessity may be created, there must be necessity in the strict sense of the term; inconvenience, however great, is not sufficient.⁽⁵⁾ Thus if a man has some other way to and from his own land, however circuitous and inconvenient that way may be, and however advantageous a passage across his neighbour's land might be, he cannot acquire a way of necessity over the neighbour's land. And where a line of railway intersected M's land, and the railway company had, under statutory powers, bought from him the strip of land over which the line was carried as well as a piece of his land adjoining the line

(1) *Clark v. Cogge*, Cro. Jac. 170.

(2) *Esubai v. Damodar Ishvardas*, I. L. R., 16 Bom. 552.

(3) *Howton v. Pearson*, 4 R. R. 581; 8 T. R., 50.

(4) *Charu Surnokar v. Dokouri Chunder Thakoor*, I. L. R., 8 Cal. 956; see at p. 958.

(5) *Holmes v. Goring*, 2 Bing. 76; *Troctor v. Hodgson*, 10 Exch. 824; *Wutzler v. Sharpe*, I. L. R. 15 All. 270, 281, 292; *Municipality of City of Poona v. Vaman Rajaram Gholap*, I. L. R., 19 Bom. 797.

on the East side, but the right to the minerals under the line and that adjoining piece of land was reserved to him, and subsequently the company had, under their powers, bought the minerals under the line but not those under the said adjoining piece, it was held that, as under the Railways Clauses Act and the Special Act applying to this railway M was entitled to make passages from his land on the West side of the line, for the purpose of getting at and working the minerals under the surface of the piece of land on the other side of the line, a right of way for that purpose over the line, which would otherwise have been impliedly reserved to him, was not so reserved, and he was only entitled to tunnel under the railway for that purpose.⁽¹⁾ In a Bombay case, in which a tenant was held entitled to a way of necessity over his landlord's adjoining land, which included the use of such way by sweepers employed by him, it was said that "whether it would be right in this country to apply" the reasoning in *Bolton v. Bolton*⁽²⁾ that the grantee is only entitled to one way of necessity "under all circumstances, having regard to the prejudice of the higher castes, which prevails in this country, against being brought into proximity with persons whose occupation it is to remove the contents of privies, may be open to doubt."⁽³⁾

The rule of the English non-statutory law is the same;⁽⁴⁾ Paragraph (b). and by the Conveyancing and Law of Property Act, 1881, s. 6, it is enacted that a conveyance (which is defined to include any transfer *inter vivos*)⁽⁵⁾ of land (which is defined to include houses and other buildings, and corporeal hereditaments generally)⁽⁶⁾, shall, if and so far as a contrary inten-

(1) *Midland Railway Co. v. Miles*, L. R., 33 Ch. D. 632, 644; 30 Ch. D. 634.

(2) L. R., 11 Ch. D. 971.

(3) *Esubai v. Damodar Ishvardas*, I. L. R., 16 Bom. 559, 560.

(4) *Polden v. Bastard*, L. R., 1 Q. B. 156, 161; *Watts v. Kelson*, L. R. 6 Ch. App. 166; *Bayley v. G. W. R. Co.*, L. R. 26 Ch. D. at p. 438 (*per CHITTY, J.*); *Palmer v. Fletcher*, 1 Lev. 122; *Phillips v. Low*, L. R., 1892, 1 Ch. 47; *Beddington v. Atlee*, L. R., 35 Ch. D. at p. 322.

(5) S. 2, (v), of the Act.

(6) S. 2, (ii).

tion is not expressed in the conveyance, be deemed to include and shall operate to convey with the land "all . . . commons, . . . ways, passages, lights, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever appertaining or reputed to appertain to the land or any part thereof or at the time of conveyance demised, occupied or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof,"⁽¹⁾ These words thus to be read into conveyances by implication, unless and so far as not so expressly excluded, have the effect not only of transferring to the transferee of the land any easement already existing, and annexed thereto, but also of converting into easements to which the transferee, as such, becomes entitled, any *quasi*-easements, whether apparent and continuous or not, which the transferor, or his tenant, may have been using, at and before the time of the transfer, for the beneficial enjoyment of the property transferred, over other and adjoining property belonging to him.⁽²⁾ See, further, as to this enactment, note to S. 19.

Where a way over another tenement of the transferor, enjoyed for the beneficial use of the tenement transferred, is a formed road, it has been held to be in the nature of a continuous and apparent easement so as to pass to the transferee by implied grant, even though there were no general words in the instrument of transfer;⁽³⁾ or be reserved to the transferor, by implied reservation.⁽⁴⁾ In *Thomas v. Owen*⁽⁴⁾ the Court of Appeal, in their judgment, said: "it is urged that alike in implied reservations and in implied grants a rule exists to this effect, that whilst such an implication may arise in the case of easements of necessity and continuous easements, it cannot arise in the case of

(1) S. 6 of the Act.

(2) See *In re Peck and London School Board*, L. R., 1893, 2 Ch. 315, 320.

(3) *Brown v. Alabaster*, L. R., 37 Ch. D. 490. See also *Ford v. Metropolitan Ry. Co.* L. R., 17 Q. B. D. 12; *Watts v. Kelson*, L. R., 6 Ch. 166, 174.

(4) *Thomas v. Owen*, L. R., 20 Q. B. D. 225, 231.

easements which are neither of necessity nor continuous, and for this proposition *Polden v. Bastard* (1) is cited, and many other authorities might have been invoked. But on this principle, as established by such decisions, there has been engrafted by other decisions an exception in the case of a formed road made over an alleged servient tenement to and for the apparent use of the dominant tenement (per BRAMWELL, B., in *Langley v. Hammond* (2); *Watts v. Kelson* (3)); and if the exception arises in the case of a grant we think it ought to arise in the case of a reservation made to support an earlier grant, as in the present case" (4). And in *Baring v. Abingdon*, BOWEN, L. J., said (*obiter*): "Where you find a formed road which is obviously and visibly laid out for the purpose of rendering the enjoyment of a particular house or land more feasible, the right to enjoy the formed road passes by implication, certainly when there are words capable of passing it, and I see no reason to think that it would not pass in a similar case without any words at all." (5) In *Wutzler v. Sharpe* (6) the Allahabad High Court held that a right of way over a made and visible path on other adjoining land of the transferor had not been acquired by the transferee of a house and land as an apparent and continuous easement, although it was used at the time of the transfer for the beneficial enjoyment of the house and was necessary for the enjoyment of the house in the state in which it was at the time of severance; the transferee having refused to produce, though he could have produced, the deed of transfer, and the Court being consequently precluded from ascertaining whether an intention that such a right should not pass was expressed or necessarily implied in that deed. The Court referred to *Bailey v. G. W. R. Co.* (7), but did not refer to,

(1) L. R., 1 Q. B. 156.

(3) L. R. 6 Ch. 166.

(2) L. R., 3 Ex. 161.

(4) L. R., 20 Q. B. D. 231.

(5) L. R., 1892, 2 Ch. at p. 398, 399. See also observations of CHITTY, J., (also *obiter*) in *Bailey v. G. W. R. Co.*, L. R., 26 Ch. D., at p. 441, 442.

(6) I. L. R., 15 All. 370.

(7) L. R., 26 Ch. D. 434.

nor, apparently, consider, *Brown v. Alabaster*⁽¹⁾ nor *Forl v. Metropolitan R. Co.*⁽²⁾ nor *Thomas v. Owen*⁽³⁾.

Where the owner of tenements A and B sells A and executes a conveyance of it to Z, but previously to the contract for the sale of A to Z, has contracted to sell B to Y, though the conveyance of B to Y is not executed till after the execution of the conveyance of A to Z, Z cannot, under the English law, acquire by the transfer any continuous and apparent easement (not being an easement of necessity) in B, because at the time of the contract for sale, as well as at the time of the conveyance, of A to Z, Y was, by virtue of the contract for sale to him, the beneficial owner of B, and the vendor was only a trustee of it for Y⁽⁴⁾.

"unless a different intention is expressed or necessarily implied."

In *Myers v. Catterson*,⁽⁵⁾ by the contract between the parties the right to light impliedly conveyed to the grantee of a house was, it was held, made subject to a right reserved to the grantor to build, for certain purposes only, on adjacent land retained by him, notwithstanding that by such building he might obstruct the access of light to the grantee's house, and a building erected by the grantor's successor in title, on the land so retained, obstructing such access of light, was held not to have been built for those purposes, and therefore not to be within the reservation, but an invasion of the right to light of the grantee of the house. In *Wilson v. Queen's Club*⁽⁶⁾ the owner of a certain piece of land, which was laid out for building, granted a lease of a portion of the land to the plaintiff's predecessor in title, upon, and in consideration of, the lessee having erected a house thereon. The entire property, of which a portion had been so leased, had previously to the lease been mortgaged to a person who subsequently conveyed to the defendant the portion of it not comprised in the lease. The defendant used the land so conveyed

(1) L. R., 37 Ch. D. 490.

(2) L. R., 17 Q. B. D. 12.

(3) L. R., 20 Q. B. D. 225, 231.

(4) *Beddington v. Atlee*, L. R., 35 Ch. D. 317.

(5) L. R., 43 Ch. D. 470.

(6) L. R., 1891, 3 Ch. 522.

to him as a cricket field, and he erected along the edge of it where it adjoined the plaintiff's property a hoarding, in order to prevent the tenants of the plaintiff's house from looking into the cricket field, which materially obstructed the access of light to, and darkened, some of the windows of the plaintiffs' house. It was held that, assuming that under the circumstances existing at the date of the lease, it must have been contemplated by the parties, lessor and lessee, that the rest of the land, adjoining the portion leased, was to be used as building land, the right to light impliedly granted to the lessee by the lease was not such as to prevent the adjoining land being built on, but that, subject to this impliedly reserved right of the lessor to build on that land and use it for building purposes, the right to light of the house could not be interfered with; and that therefore the defendant (who, as the mortgagee's transferee, was bound by the lease equally as the mortgagor, the lease having been made in accordance with the requirements of s. 18. of the Conveyancing and Law of Property Act), in erecting the hoarding, which was not a building nor an erection for building purposes but was put up for the purpose of preventing the occupants of the plaintiff's house from overlooking the cricket ground, was not within his right, and was infringing the plaintiff's right to light, and an injunction restraining the defendant from retaining the hoarding erected was granted. In *Birmingham, Dudley & District Banking Co. v. Ross*,⁽¹⁾ a corporation of a Town, having bought a tract of land in the Town under a scheme for effecting an improvement of that part of the Town, granted to the plaintiffs a lease of a piece of such land and a newly erected building thereon, abutting on a passage twenty feet wide, which the corporation agreed to keep open and on the other side of which were at that time old buildings about twenty-five feet high. The corporation demised the land on the other side of the passage to the defendant, who erected on the site of the old buildings a

(1) L. R., 38 Ch. D. 206.

house eighty feet high, which materially interfered with the access of light to the windows of the plaintiffs' building. In an action for obstruction of light, it was held that, as the plaintiffs knew when they took their lease from the corporation that the premises leased to them were part of an intended new street and that on the land on the other side of the passage were to be built other houses forming part of such street, there was an implication necessarily arising from the circumstances under which the lease to the plaintiffs was made that the plaintiffs were not to have such a right of light as would prevent the corporation or their transferees from building houses on the land on the opposite side of the passage, notwithstanding the plaintiffs' light might thereby be materially interfered with, and the suit was dismissed. In *Broomfield v. Williams*⁽¹⁾ the defendant, the owner of a plot of land and a house which he had just built thereon and of an adjoining piece of vacant land, sold the plot and house to the plaintiff. The western side of the house contained windows facing the piece of vacant land. A few months afterwards the defendant commenced building a house on that land so close to the boundary wall that it would, if built, materially interfere with the access of light to the plaintiff's windows. The defendant relied on the facts that in the deed of conveyance to the plaintiff and in a plan thereon the piece of land retained by the defendant was referred to as "building land", and that the plaintiff knew when he purchased the plot and house that the defendant was about to build upon the vacant land; but the deed contained no reservation to the vendor of a right so to erect buildings on that land as to darken the windows of the house conveyed to the plaintiff. It was held that the facts above mentioned relied upon by the defendant did not negative the implied right to light to the windows, passing over the defendant's adjoining land, which the plaintiff *prima facie* had as grantee of the house, for it was quite possible to

(1) L. R., 1897, 1 Ch. 602,

build on that adjoining land without darkening those windows; and that for the same reason such right to light was conveyed by the general words "together with all lights appertaining to or occupied or enjoyed with or reputed as part of" the house, which under s. 6, sub-s. 2, of the Conveyancing Act, 1881, the conveyance must be read as if it contained, the reference in the conveyance and plan to the adjoining land as "building land" being insufficient to shew a "contrary intention" under sub-s. 4 of s. 6 of that Act.

The rule expressed in this sub-section has been held to be applicable in a case where the enjoyment (which was of the water of an artificial watercourse flowing through land of the transferor other than that transferred into the land transferred) prior and up to the time of the transfer, was not by the transferor but by the transferee, he being at the time of such enjoyment in possession of the *quasi*-dominant land as a tenant of the transferor under an agreement for a lease.⁽¹⁾ The transfer was a lease for 999 years.

Here there is a departure from the English law. By the Paragraph(d). English law, upon the principle that a person cannot derogate from his own grant and that a grant is to be construed in favor of the grantee rather than the grantor, if the owner of immoveable property makes a transfer of a portion of that property, and retains the other portion, if he wishes to reserve to himself, as an easement, any continuous and apparent *quasi*-easement which he enjoyed over the transferred portion for the benefit of the portion retained while he owned the entire property, he must reserve it expressly in the grant, otherwise he will not be entitled to it by implication;⁽²⁾ except where it is one of necessity,⁽³⁾ or where the tene-

(1) *Morgan v. Kirby*, 1 L. R., 2 Mad. 46.

(2) *Wheeldon v. Burrows*, L. R., 12 Ch. D. 31, 59 (overruling *Pyer v. Carter*, 1 H. & N. 916); *White v. Bass*, 7 H. & N. 722; *Suffield v. Brown*, 4 DeG. J. & S. 185; *Crossley & Sons v. Lightowler*, L. R., 2 Ch. App. 478; *Tenant v. Goodwin*, 2 d. Raym. 1093; *Taws v. Knowles*, L. R., 1891, 2 Q. B., 564.

(3) *Wheeldon v. Burrows*, L. R., 12 Ch. D. 49; *Crossley & Sons, Ltd. v. Lightowler*, L. R., 2 Ch. App. 486; *Pinnington v. Galland*, 9 Ex. 1, 12; *Davies v. Sear*, L. R., 7 Eq. 427, 431.

ment granted and the tenement retained are parts of one entire block, laid out or to be laid out in accordance with what Lord FITZGERALD in *Russell v. Watts* termed a "common interdependent design."⁽¹⁾ This latter class of cases, properly regarded, is not an exception to the rule: LINDLEY, L. J., in *Russell v. Watts*, said, referring to *Wheeldon v. Burrows*: "I take the general rule to be as there laid down, but, in my opinion, this case does not fall within it. This is not the case of a vendor of a piece of land attempting to derogate from his own grant. It is more like the case of several persons interested in several pieces of land all agreeing to build upon them in a particular way, so as to accommodate one another, and of one of them afterwards, when the buildings are up, insisting on rights which are quite inconsistent with the enjoyment of the buildings as erected. There is no authority to shew that in such a case any one of such persons could afterwards build on his land so as to obstruct his neighbour's lights, and in the absence of such authority I am of opinion that he cannot do so. In such a case it appears to me that the cross easements which are created in the first instance are impliedly granted in equity if not at law, and if such easements are apparent, no purchaser can protect himself against them by alleging that he bought without notice of them."⁽²⁾

Where, in British India, the Easements Act does not (or did not at the time when the cause of action arose) extend, the English rule, that there is no implied reservation of a right to light or other continuous and apparent easement in favor of a grantor, has been held to be the rule which ought to be followed, as being the rule which accords with equity and good conscience, rather than the contrary rule which has been adopted by the Indian Legislature in subsection(d) of s. 13 of the Easements Act.⁽³⁾

(1) L. R., 10 App. Cas., at p. 615.

(2) L. R., 25 Ch. D. at p. 578, 579. This passage is cited with approval by Lord FITZGERALD in the appeal before the House of Lords: L. R., 10 App. Cas., at p. 616.

(3) *Chunilal Mancharam v. Manishankar Atmaram*, I. L. R., 18 Bom. 616.

See also note to paragraph (b) of this section.

The rule enacted by this section as to easements created on a partition of joint property is applicable in parts of India where this Act is not in force and was applicable in those parts where it was not in force till Act VIII of 1891 came into operation.⁽¹⁾ Paragraph (f).

The case of an owner of two adjoining tenements transferring one of them to one person and the other to another by contemporaneous conveyances, or devises which vest contemporaneously, is not provided for in this section. In such a case the transferee of either tenement is, by the English law, entitled to any continuous and apparent easement over the other tenement which was enjoyed immediately before the transfer, whether *inter vivos* or testamentary, took effect, provided the transfer to him was, at the time when it took effect, known (as in the case of the devise it must have been) to the other transferee;⁽²⁾ and this has been held to be the law of India.⁽³⁾ In *Phillips v. Low*,⁽⁴⁾ which was a case in which a testator devised a house to one person and an adjoining field to another devisee, it was contended that the doctrine of implied grant of rights to light and other continuous and apparent easements in cases of simultaneous transfers of two adjoining tenements was limited to transfers

(1) *Purshotam Sakharani v. Durgaji Tukaram*, I. L. R., 14 Bom. 452; *Bottlewalla v. Bottlewalla*, 8 Bom., H. C. R., O. C., 181; *Modhoooodun Dey v. Bissonath Dey*, 15 Beng. L. R., 361. *Charu Surnokar v. Dokouri Chunder Thakoor*, I. L. R., 8 Cal. 956.

(2) *Allen v. Taylor*, L. R., 16 Ch. D. 355; *Swanborough v. Coventry*, 9 Bing. 305; *Compton v. Richards*, 1 Price 27; *Russell v. Watts*, L. R., 10 App. Cas. 590; 25 Ch. D. 573. See also *Rigby v. Bennett*, L. R., 21 Ch. D. at 567.

(3) *Delhi and London Bank, Ltd. v. Hem Lall Dutt*, I. L. R., 14 Cal. 839, 853. See also *Charu Surnokar v. Dokouri Chunder Thakoor*, I. L. R., 8 Cal. 956, in which case however it is not clear whether the grants of the two tenements were simultaneous. In that case moreover, the easement claimed was a right of way over a path, which is a discontinuous easement, and it is therefore difficult to see why the Bench should have sent the case back to the District Judge to determine (*inter alia*) whether the easement existed on the ground that it was continuous and apparent and that the path had been used similarly before the severance of the two tenements.

(4) L. R. 1892, 1 Ch. 47.

arising out of contract between the parties, and to conveyances for valuable consideration, but this contention was over-ruled, and the rule was held to apply to devises under a will, as well as to simultaneous conveyances *inter vivos*.

Illustration(k). In cases of transfer of immoveable property, a grant of an easement may be implied from the purpose or object for which the property is transferred. Thus where A applied to B. & Co. for the sale to him of a piece of land, for the purpose of erecting thereon an iron foundry and other buildings, and informed B. & Co. of the purpose for which he required the land, and it was at the time of the sale and conveyance of the land fully known to the vendors that the purchaser required the land for that purpose, it was held that there was an implied covenant on the part of the vendors to give the purchaser such support from adjoining land, which belonged to the vendors, as would be required for supporting the buildings intended to be erected on the land sold, when erected.⁽¹⁾ Such a case as this is, as is shewn by *Illustration (k)* to this section, regarded by the framers of this Act as a case of a grant of an easement of necessity as defined in this section, but it may be doubted whether that definition as it stands, and without some expansion, includes a case of a contingent grant of an easement of necessity, like this, for the grant of the support is contingent upon the transferee's erecting the building; it is not exactly the same as the case where the land is transferred with the building already erected upon it at the time of the transfer. In *Rigby v. Bennett*⁽²⁾ the question was mooted but not decided by the judges, whether the ordinary rule that on a grant of land for building purposes there is an implied grant of a right of support to the building, when erected, from other adjoining land of the grantor, would apply in a case where the adjoining land was granted to another grantee contemporaneously with the grant of the land for building purposes, or in a case where

(1) *Siddons v. Short*, L. R., 2 O. P. D. 572, 577.

(2) L. R., 21 Ch. D., p. 567, 569.

such a right of support would render it impossible to build on the adjoining land, or in a case where the grantee knew that the grantor intended to use the adjoining land for a particular purpose, and the right claimed by the grantee was inconsistent with that purpose. That in the last two of such cases the rule would apply under this Act, is shown by this section and its *Illustration (k)*.

See also note to Sec. 8 (pp. 50 and foll.).

14. When [a]⁽¹⁾ right to a way of necessity is created under section thirteen, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

Direction of
way of neces-
sity.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

Commentary.

This section accords with the English law.⁽²⁾

15. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

Acquisition by
prescription.

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an

(1) Amended by Act XII of 1891.

(2) See *Bolton v. Bolton*, L. R., 11 Ch. D. 968; *Pearson v. Spencer*, 1 B. & S. 571, 585.

easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

The right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the

person making or authorizing the same to be made.

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to Government, this section shall be read as if, for the words “twenty years,” the words “sixty years” were substituted.

Illustrations.

(a) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January, 1862, to 1st January, 1882. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed “as an easement” for twenty years.

(c) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during

the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

Commentary.

This section
is retrospective.

This section is, evidently, retrospective, in respect that the whole or part of the prescriptive period of enjoyment, on which the claim to an easement is founded, may have been prior to the coming into force of the Act. It was held, in *Simper v. Foley* (1), that the 3rd section of the Prescription Act of 1832 was thus retrospective, and that the plaintiff therefore had acquired thereunder a right to light by enjoyment from 1815 to 1835. Sir W. PAGE WOOD, V. C., in his judgment, said: "The Act passed in 1832 says (sect. 3), that "when the access and use of light to and for any dwelling house, workshop or other building, *shall have been* actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible"; and those words are clearly retrospective, so that the right may be acquired by virtue of enjoyment prior to the passing of the Act." (2) Similarly, in this section, the words "have been" and "has been," in the first three paragraphs, respectively, appear to be retrospective; and this is shown, too, by *Illustration (a)* to the section.

"peaceably."

Enjoyment is *non-peaceable*, not only where it is exercised forcibly, but where the right is contested by the party against whom it is claimed, by litigation or otherwise. (3)

"as an easement."

It is part of the definition of an easement, in Sec. 4, that it is a right of the owner or occupier of one tenement over another tenement "not his own." If the owner of the one tenement be also owner of the other, which he uses in some way for the more beneficial enjoyment of the former, such his use of the latter tenement is by virtue of his own proprie-

(1) 2 John. and Hem. 555.

(2) 2 John. and Hem. 563.

(3) *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267.

tary rights in it; hence there can be no prescriptive acquisition so long as there is unity of ownership of the two tenements;(1) and hence also union of ownership of two tenements extinguishes a pre-existing easement to which one was subject in favor of the other (see Sec. 46). But not only unity of ownership, but unity of possession, of two tenements, renders prescriptive acquisition of an easement over one in favor of the other, by the person in possession of both, impossible.(2) Thus where the lessee of a tenement claimed to have acquired by prescriptive enjoyment, for the benefit of that tenement, an easement over another tenement of which he was also lessee, the claim was held unsustainable by reason of the unity of possession, though the two tenements were held under different landlords.(3) The definition of an easement in Sec. 4 of this Act, however, does not make it necessary that the servient tenement should be not only "not his" (the dominant owner's) "own" but also not in his possession, because though an easement is suspended by the dominant owner becoming entitled to the possession of the servient tenement for a limited interest,(4) it is not extinguished thereby, unless and until he has been in such possession for twenty years;(5) and it is therefore possible, when once an easement has been acquired by prescription or otherwise, for the easement to exist (though only in a state of suspension, and as a *quasi*-easement, as to enjoyment,) notwithstanding the servient tenement being in the owner's possession.

On the same ground user under a claim of right of ownership of the property, in or over which such user is had, cannot operate to found a right of easement over that property.(6)

(1) See *Bright v. Walker*, 1 C. M. & R. 219; *Outram v. Maude*, L. R., 17 Ch. D. 391.

(2) See *Illustration (b)* to this section, and *Modhoooodun Dey v. Bissonath Dey*, 15 Be g. L. R. 361, 365.

(3) *Clay v. Thackerah*, 9 C. & P. 47; *Harbidge v. Warwick*, 3 Exch. 552.

(4) See s. 49.

(5) See ss. 47, 51.

(6) *Chunital Fulchand v. Mangaldas Govardhandas*, I.L.R. 16 Bom. 592.

"without interruption."

The necessity that the enjoyment should be uninterrupted implies, according to the English law, that the person to whom the burdened tenement belongs should be in a position to be able to interrupt it. It is not, as Lord PENZANCE said, in *Dalton v. Angus*,⁽¹⁾ the mere lapse of time which is the ground of the right arising from enjoyment, "but the inferences which are reasonably drawn from the continuous existence of a given state of things during that period of time. These inferences are inferences of acquiescence or consent, and they are drawn from the fact that the person against whom the right is claimed has, for a length of time, failed to interrupt or prevent an enjoyment by his neighbour which he might have interrupted had he so pleased." Inability on the part of the plaintiff to obstruct or prevent the enjoyment of the benefit claimed by the defendant, was the ground of the decision in *Sturges v. Bridgman*⁽²⁾ that the defendant had not acquired an easement. The defendant carried on the business of a confectioner on premises abutting on one end of the plaintiff's garden, at the other end of which was plaintiff's house. In carrying on such business, the defendant created a noise. This noise caused no nuisance to the plaintiff in his house; but in 1873 the plaintiff, who was a physician, built a consulting room at that end of his garden which abutted on the defendant's premises, and the noise then became a nuisance to the plaintiff, who consequently brought his suit for an injunction. The defendant proved that he had made the noise for twenty years next before the date of the suit, 1878. It was held that inasmuch as the plaintiff was not affected by the noise as an actionable nuisance to him until he built the consulting room, the power of prevention, which is the basis of the presumption of acquiescence or consent on the part of the owner of the burdened tenement, did not exist till then, and therefore no easement either by prescription or by presumed grant had been acquired.⁽³⁾ In connection with this, may be noticed

(1) L. R., 6 App. Ca. 805.

(2) L. R., 11 Ch. D. 852. See also *Arkwright v. Gell*, 5 M. & W. 203.

(3) See also note on *Explanation IV* to this section.

the difference, which was pointed out by the Court of Appeal in their judgment in *Sturges v. Bridgman*, between affirmative and negative easements, in respect of the power of interruption of the enjoyment: "The affirmative easement differs from the negative easement in this, that the latter can under no circumstances be interrupted except by acts done upon the servient tenement, but the former, constituting, as it does, a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption. To put concrete cases—the passage of light and air to your neighbour's windows may be physically interrupted by you, but gives you no legal grounds of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both. Noise is similar to currents of air and the flow of subterranean and uncertain streams in its practical incapability of physical interruption, but it differs from them in its capability of grounding an action."⁽¹⁾ In that case (*Sturges v. Bridgman*), the Court of Appeal, in their judgment, said,⁽²⁾ "The law governing the acquisition of easements by user stands thus: consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses." And in the opinion of the Judges, taken and concurred in by the House of Lords, in *Chasemore v. Richards*,⁽³⁾ it was said; "The presumption of

(1) L. R., 11 Ch. D. 864.

(2) L. R., 11 Ch. D. 863.

(3) 7 H. L. C. 370.

a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant." And in the judgment in *Arkwright v. Gell*,⁽¹⁾ the Court said, speaking of the Prescription Act of 1832: "The Act expressly requires enjoyment for different periods 'without interruption,' and therefore necessarily imports such an user as could be interrupted by some one capable of resisting the claim." The Indian Legislature has taken care to shew clearly what it means by 'interruption', by the second *Explanation* to this section: (2) which is substantially identical with the *Explanation* in Sec. 26 of Act XV of 1877 and that in Sec. 27 of Act IX of 1871. It might be thought that in requiring that the prescriptive enjoyment should be without a break in the enjoyment caused by an obstruction (submitted to, or acquiesced in, as provided by the section) the Act impliedly required that the person over whose tenement the enjoyment is had should be in a position, from knowledge of the user, and otherwise, to be able, if he chooses, to obstruct the enjoyment. In a case, however, decided by the High Court of Calcutta under Act XV of 1877,⁽³⁾ GARTH, C. J., and PRINSEP, J., held that a right of way or any other easement could be acquired by user, under that Act (XV of 1877), notwithstanding that the owner of the burdened tenement was ignorant of the user. They admitted that if the claim were made on the ground of immemorial user or of lost grant, as it still might be, the English law which requires knowledge on the part of the owner of the burdened tenement of the enjoyment, in order that a title could be acquired against him by such enjoyment, would apply; and also that such knowledge was necessary for the acquisition of a right under the English Prescription Act; but they were of opinion that no part of

(1) 5 M. & W. 203.

(2) The English Prescription Act (s. 4) also provides that the interruption must have been submitted to, or acquiesced in, for one year after the claimant has had notice of it and of the person making it. See Appendix V.

(3) *Arsan v. Rakhal Chunder Roy Chowdhry*, I. L. R., 10 Cal. 214.

Act XV of 1877, not even Sec. 26, had anything to do with prescription; although the Act is "An Act" not only "for the limitation of suits" but also "for other purposes," and its Preamble recites not only that "it is expedient to amend the law relating to the limitation of suits," &c., but that it is "also expedient to provide rules for acquiring by possession the ownership of easements and other property;" and although Sec. 26 of Act XV of 1877 (as also Sec. 27 of Act IX of 1871) is in the same form, as well as being the same in substance, as the section in the Easements Act relating to acquisition by prescription (Sec. 15). As a proof that such knowledge of the burdened owner was not intended by the Indian Legislature to be necessary to the acquisition of an easement, they referred to the fact that Act XV of 1877 contained no such proviso as that of Sec. 7 of the English Prescription Act⁽¹⁾ in cases where the burdened owner is under a legal disability, and certain other cases, though it contained a provision, in Sec. 27, answering to Sec. 8 of the English Prescription Act, and protecting the rights of reversioners. They added "It is probable that the words 'peaceably and openly,' which are not in the English Act, have been introduced into the Indian Act for the very purpose of preventing these rights being acquired by stealth or by a constantly contested user, although actual knowledge of the user on the part of the servient owner may not be necessary." In *Bhuban Mohun Banerji v. Elliott*,⁽²⁾ in which the plaintiffs claimed a prescriptive right to light and air in respect of their house, in Calcutta, and which was decided under the English law as it stood before the Prescription Act, it was held that, in order to establish the right claimed, acquiescence on the part of the owner of the burdened tenement, in the enjoyment of the light and air, during the whole of the prescriptive period must be proved, and that, as during part of such period the owner of the burdened tenement was not in possession thereof himself, but lived at

(1) See Appendix V.

(2) 6 Beng. L. R. 85.

Moorsheadabad, and it was in the possession of his tenant, and the evidence did not prove that the owner had knowledge either actually, or constructively through an agent, of such enjoyment by the plaintiffs, and as, if there was no such knowledge, there could be no acquiescence, the suit was dismissed.⁽¹⁾ On appeal to Her Majesty in Council, their Lordships of the Privy Council said: "It is admitted that the Prescription Act, 2 & 3 Will. 4, c. 71, does not apply, and that we must have resort to the English law which prevailed before its passing. So far as this would seem to be clear that the plaintiffs, in order to establish their title, would have to show an uninterrupted user of at least twenty years, with the acquiescence of the defendant, the owner of the servient tenement."⁽²⁾ But the case was decided by the Privy Council upon a different ground, *viz.* that about a month before the prescriptive period of enjoyment had expired the defendants had given notice to the plaintiffs of their intention to erect the building of which the plaintiffs complained, and had in pursuance of such notice commenced its erection. Their Lordships held that under these circumstances, though the building had not been raised to such a height as to amount to an obstruction to the plaintiffs' windows till some days after the twenty years had elapsed, the plaintiffs had failed to substantiate an uninterrupted user of the light and air for twenty years with the acquiescence of the defendants.

Ordinarily, the power of resisting the user which the owner of the burdened tenement must have in order that the user may operate against him as prescriptive user, must be a power to interrupt *without an immoderate expenditure of money or labour*. In *Webb v. Bird*,⁽³⁾ WILLES, J., said: "In general a man cannot establish a right by lapse of time and

(1) See also *Baxter v. Taylor*, 4 B. & Ad. 72; *Winslip v. Hudspeth*, 10 Exch. 5; *Daniel v. North*, 11 East 372; *Wheaton v. Maple & Co.*, L. R. 1893, 3 Ch. 48, 57, 62.

(2) 12 Beng. L. R. 406, 409; L. R., I. A., Suppl. Vol., 175.

(3) 10 C. B. (N. S.) 285.

acquiescence against his neighbour, unless he shews that the party against whom the right is acquired might have brought an action, or done some act, to put a stop to the claim, *without an unreasonable waste of labour and expense.*" It was on this ground that a prescriptive right to the passage of currents of wind and air to a windmill in *Webb v. Bird*, and to the passage of water by percolation underground in *Chasemore v. Richards*,⁽¹⁾ was held to be not acquirable. But to this general rule, the cases of prescriptive easements of light, and of support, are exceptions; see the notes, below, on those easements respectively, and see judgment of BLACKBURN, J., in *Webb v. Bird*,⁽²⁾ and the judgments of the House of Lords in *Dalton v. Angus*.⁽³⁾

The enjoyment may be interrupted in respect of a part only of the tenement subjected to the enjoyment, so that a prescriptive right is not acquired in respect of that portion, but is acquired in respect of the rest of the burdened tenement.⁽⁴⁾

See, further, note, below, on *Explanation II.*

"Openly" is the opposite to *clam*, and implies that the enjoyment is had under such circumstances as to afford the owner of the property subjected to the enjoyment knowledge, or the means of knowledge, of such enjoyment taking place.⁽⁵⁾ If the latter has no knowledge, nor means of knowledge, of the enjoyment, it is clear that he cannot be expected to resist it, and therefore that acquiescence or laches cannot be imputed to him.⁽⁶⁾ In a case governed by Scotch law, *McInroy v. Duke of Athol* ⁽⁷⁾, Lord Watson, with whose opinion their Lordships the other members of the House of Lords who heard the appeal⁽⁸⁾ expressed their entire concurrence, said in his judg-

"openly."

(1) 7 H. L. C. 349. And see s. 17(d) of this Act. And see also note, below, on Temporary artificial watercourses.

(2) 13 C. B. (N. S.) 844.

(3) L. R., 6 App. Ca. 790—832.

(4) *Davies v. Williams*, 16 Q. B., 546, 557; *Welcome v. Upton*, 6 M. & W. 536.

(5) *Macpherson v. Scottish rights of way and recreation Society*, L. R. 13 App. Ca. 749; *Dalton v. Angus*, L. R., 6 App. Ca. 801.

(6) *Dalton v. Angus*, L. R., 6 App. Ca., p. 801 (*per* Lord SELBORNE, L. C.); *Gray v. Bond*, 2 Br. & Bingh. 671.

(7) L. R., 1891, A. C. 629, 633.

(8) Lord BRAMWELL and the Earl of SELBORNE.

ment: "I do not doubt that, in order to found a prescriptive right of servitude according to Scotch law, acts of possession must be overt, in this sense, that they must in themselves be of such a character, or be done in such circumstances, as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted and the nature of the right. The proprietor who seeks to establish the right cannot, in my opinion, avail himself of any acts of possession *in alieno solo*, unless he is able to show that they either were known or ought to have been known, to its owner, or to the persons to whom he entrusted the charge of his property. In many, indeed in most cases, where a servitude of way is claimed, the natural and necessary inference arising from its local situation is that the user must have been known to the owner of the *solum*, or to those whose duty it was to give him information. But that is an inference which it would be very unsafe to derive from the mere fact of the occasional user of an isolated deer track in a region remote from public observation, which is only visited at rare intervals by a few sportsmen, foresters, or shepherds." In that case the appellant claimed a right of way for sporting purposes over a pass running, nearly due east and west, between two mountains, the pass and the mountain land on either side of it, north and south, being the property of the respondent, and the land both on the east and west of the pass and adjoining both its extremities belonging to the appellant. The mountains and pass were only occasionally resorted to by the respondent and his predecessors in title, for purposes of sport, and by their foresters and shepherds. From 1841 to 1887, when the challenge was given which led to the institution of the suit shortly afterwards, the appellant and his predecessors and their friends or game-tenants at certain seasons in each year, in the course of their sport (the appellant's lands also were used principally for sporting purposes), used the pass as a convenient means of going from their ground lying on one side to their ground lying on the other side of the mountain range; but even "the appellant's own evidence pointed strongly

to the inference that their use of the track was made in such circumstances that it was not likely to come, and in point of fact never came, to the knowledge of the respondent or his predecessors"; while "a large and concurrent amount of testimony had been adduced by the respondent, which shewed that the appellant's user was unseen by, and unknown to, the proprietors of the Athole forest (the respondent and his predecessors) and their shepherds and foresters;" and on the only two occasions on which user of the pass by the appellant and his predecessor was shewn to have been known to the respondent and his predecessor respectively, the latter repudiated the user as a trespass, on the first occasion by an order to the appellant's predecessor to turn back, and on the second by a letter of remonstrance, and the conduct thereupon of the appellant and his predecessor respectively was such as to imply an admission on their part of trespass. It was held that there was not such an open and unequivocal assertion of the right of way claimed as is required by the Scotch law in order to the establishment of a servitude of way. Where during the period of user on which a claim to a prescriptive right of way over land in the mufussal was based the Government was the owner of that land, it was held that, assuming that knowledge on the part of Government of the user was necessary in order to the acquisition of the right (which, it was held, was not the case under the Limitation Act of 1877, s. 26, by which the case was governed ⁽¹⁾), such knowledge should have been presumed; the land over which the way was used being in a village, adjoining the high road, and in the immediate neighbourhood of a public cemetery; the claimant having used it day after day for 30 or 40 years; and two Government officers of the District having proved his use of the way for many years.⁽²⁾ "If," said GARTH, C.J., in the judgment of the Court, "the personal knowledge of the Collector were necessary in all cases to the acquisition of rights of way over Government land, such acquisition would

(1) See the note on the case, above, pp. 94, 95.

(2) *Arzan v. Rakhal Chunder*, I. L. R., 10 Calc. 214.

be almost an impossibility. There is no reason why Government should be in any better position in this respect than any other land-owner, and there appears to have been abundant evidence in this case from which the knowledge of the superior Government officers should have been presumed.”⁽¹⁾ See also *Dawson v. Duke of Norfolk* ⁽²⁾, a case of a claim to a common appurtenant by presumed grant, and *Daniel v. North*⁽³⁾ and *Wheaton v. Maple & Co.*,⁽⁴⁾ in both which cases claims to a right to light were based on (*inter alia*) presumption of lost grant. See also cases referred to in note on the words “without interruption” (above, pages 92—97). In *Bright v. Walker*, in the judgment of the Court of Exchequer delivered by PARKE, B., he says, of the plaintiff’s claim to a right of way under the Prescription Act, “Again, such claim may be defeated . . . by the same means by which a similar claim arising by custom, prescription, or grant would now be defeasible, and therefore it may be answered by proof of . . . the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised.”⁽⁵⁾ It is to be observed that in the cases of light and air neither do the Easements Act or Act XV of 1877, nor did Act IX of 1871, require that the enjoyment should be had “openly,” nor does the Easements Act require this in the case of an easement of support. And see the note, above, as to the effect of the requirement that the enjoyment should be “without interruption.” In *Mathuradas Nandvalabh v. Bai Amthi*⁽⁶⁾ a case of a claim to an easement of light and air, under Act XV of 1877, which (as well as Act IX of 1871), unlike the Easements Act, requires the enjoyment, in such case, to be “as of right,” it was held that the enjoyment of light and air, in order to be “as of right,” must be “open and manifest, not furtive or invisible.”

“as of right.” The expression “as of right,” if used in the wider sense, includes “openly,” and “peaceably,” as well as “adversely,”

(1) I. L. R., 10 Calc., 219.

(2) 1 Price, 246; 16 R. R. 708.

(3) 11 East, 370.

(4) L. R., 1893, 3 Ch. 48, 57, 62.

(5) 1 C. M. & R. at p. 219.

(6) I. L. R., 7 Bom. 522, 524.

or "without license or permission." It is often, and I think ordinarily, used in this wider sense, in the English Courts and law-books. In *Tickle v. Brown*,⁽¹⁾ the Court, in their judgment, in reference to the use of the term in the Prescription Act of 1832, said: "It seems, therefore, that the "enjoyment as of right" must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right," &c. And in *Bright v. Walker*⁽²⁾ the Court, in their judgment, said: "In order to establish a right of way, and to bring the case within this section" (of the above-mentioned Act), "it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so "as of right," for that is the form in which by Sec. 5 such a claim must be pleaded; and the like evidence would have been required before the Statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right.'" And in *Solomon v. Vintners' Company*⁽³⁾ BRAMWELL, B., said in his judgment: "Now a thing cannot be enjoyed as of right unless it is openly and visibly enjoyed. . . . it was an enjoyment *clam*, not openly, and consequently not as of right." In these, as in many more passages which might be referred to, it is clear that "as of right" embraces the meaning of "openly" as well as that

(1) 4 A. & E. 382. See also *Mathuradas Nandvalabh v. Bai Amthi*, I. L. R. 7 Bom. 522.

(2) 1 O. M. & R., 219. See also *Mason v. Shrewsbury & Hereford Railway Co.*, L. R., 6 Q. B., at p. 584; *Arkwright v. Gell*, 5 M. & W. 203, 223.

(3) 4 H. & N. 585.

of "not *precario*." And it often denotes the opposite to "*vi*" ("forcibly") also. But in this section of the Easements Act the term "as of right" (though there is no definition of it in the Act) is evidently used in a narrower sense in which it signifies the opposite of "*precario*" only; for if it were taken in the larger sense, in which it comprehends all the three senses, "peaceable," "open," and "not permissive," the words "peaceably" and "openly" in the third paragraph of the section would be redundant.

Where the prescriptive enjoyment is required to be as of right, a tenant cannot acquire an easement by prescription against his own landlord, nor against another tenant holding under the same landlord.⁽¹⁾ "An easement," said Lord CAIRNS, L.C., in *Gayford v. Moffatt*⁽²⁾ "must be acquired in respect of some tenement, and the only tenement in respect of which this easement could be acquired, and which itself would become the dominant tenement, is the demised close. But the possession of the tenant of the demised close is the possession of his landlord, and it seems to be an utter violation of the first principles of the relation of landlord and tenant to suppose that the tenant, whose occupation of close A was the occupation of his landlord, could by that occupation acquire an easement over close B, also belonging to his landlord." Under the English Prescription Act of 1832, however, an easement of light can be acquired by a tenant against his landlord, and against another tenant holding under that same landlord, because Sec. 3 of that Act gives an absolute and indefeasible right to light after twenty years actual enjoyment without interruption (unless the enjoyment was through some consent or agreement expressly

(1) *Warburton v. Parke*, 2 H. & N. 64; *Gayford v. Moffat*, L. R., 4 Ch. Ap. 183, 185; *Whalley v. Tompson*, 1 Bos. & P. 375; 4 R. R. 831 (observations of EYRE, C. J., in judgment); *Udit Singh v. Kashi Ram*, I. L. R., 14 All. 185; *Kesava Pillai v. Peddu Reddi*, 1 M. H. C. R. 259; *Venkata Reddi v. Lister*, 7 M. H. C. R. 342, 346; *Kristna Ayyan v. Venkatachella Mudali*, 7 M. H. C. R., 60, 64; *Outram v. Maude*, L. R. 17 Ch. D. 391; *Russell v. Harford*, L. R. 2 Eq. 507; *Daniel v. Anderson*, 31 L. J., Ch. 610. Sec. also Sec. 12 and note thereto (p. 70.)

(2) L. R. 4 Ch. App. 133, at p. 135.

given by deed or writing) and does not require the enjoyment to have been as of right.⁽¹⁾ The right may be so acquired by one who is a tenant from year to year.⁽²⁾ And for the acquisition of such right under that Act, it is immaterial whether the building, for the benefit of which the light is enjoyed, is in the possession of one tenant or of two or more successive tenants during the prescriptive twenty years period.⁽³⁾ Under Sec. 15 of the Easements Act an easement of light, or of air, or of support, can be acquired by a tenant against his landlord, because under it the prescriptive enjoyment is not required to be as of right. But none of these easements can be acquired by prescription under this Act by a tenant against his landlord, so long as the burdened tenement is in the possession of a tenant for life or a tenant for any term of years exceeding three years, nor until the expiration of three years from the end of the period of such possession, because Sec. 16 of the Easements Act, which makes the enjoyment during such period inoperative against the reversioner if he resists the claim within three years from the end of such period, applies—unlike Sec. 8 of the English Prescription Act—to easements of light, of air, and of support, as well as to rights of way, water rights and other easements. For the same reason an easement of light, or of air, or of support, cannot be acquired by prescription under the Easements Act by one of two tenants holding different tenements under the same landlord against the other tenant, unless the tenancy of the latter is for a term not exceeding three years; it being impossible to acquire by prescription an easement against a tenant unless it is at the same time acquired against his landlord and against all the world.⁽⁴⁾ Under the English Prescription Act, on the

(1) *Frewen v. Phillipps*, 11 O. B. (N. S.) 449; *Mitchell v. Cantrill*, L. R. 37 Ch. D. 56; *Robson v. Edwards*, L. R., 1893, 2 Ch. 146; *Wheaton v. Maple & Co.*, L. R., 1893, 3 Ch. 48; *Simper v. Foley*, 2 John. & Hem. 555.

(2) *Simper v. Foley*, 2 John. & Hem. 555.

(3) *Robson v. Edwards*, L. R. 1893, 2 Ch. 146, 149.

(4) See note regarding this, below, under marginal heading "shall be absolute."

other hand, an easement of light can be acquired by a tenant against his landlord by enjoyment had while the burdened tenement is in the possession of a tenant for any term of years exceeding three years, or a tenant for life, because Sec. 8 of that Statute does not apply to easements of light.⁽¹⁾ Under Act 9 of 1871, Sec. 27, or Act 15 of 1877, Sec. 26, a right to light, air, or support could not be acquired by a tenant against his landlord or against another tenant holding under the same landlord, because by these enactments the enjoyment, in the case of these easements as well as all others, must be as of right.⁽²⁾

The enjoyment is not as of right, if the claimant has, during the period of enjoyment, done an act which amounts to an admission that he was not enjoying as of right; as where he has covenanted with the person against whom he claims at any time on three months notice to do a thing which is inconsistent with the continuance of such enjoyment.⁽³⁾

Where a tenant of land, with the knowledge and approval of his lessor, made and used for more than twenty years a watercourse through that land, whereby water was conducted to a reservoir on some adjoining land of the lessee, it was held that the lessee had not acquired a prescriptive right, which he claimed at the expiration of his lease, against the lessor, because the evidence showed that the enjoyment took place under a belief by both parties (though it might have been an erroneous belief) that it was under the lease, or under that sort of friendly comity existing between a landlord and a tenant when for the mutual convenience of both parties the landlord does not insist upon his strict right but the tenant never supposes for a moment that he is gaining any adverse right as against the landlord merely because

(1) *Wheaton v. Maple & Co.*, L. R., 1893, 3 Ch. 48; see especially at p. 68 (per LINDLEY, L. J.); *Simper v. Foley*, 2 John. & Hem. 555; *Frewen v. Phillips*, 11 C. B. (N. S.) 449; *Mitchell v. Cantrill*, L. R. 87 Ch. D. 56; *Robson v. Edwards*, L. R., 1893, 2 Ch. 146. See also Appendix V.

(2) See Appendixes III, IV.

(3) *Tone v. Preston*, L. R., 24 Ch. D. 739.

the landlord is indulgent, and that the enjoyment was therefore not as of right.⁽¹⁾ That, in such a case, an easement could not, under any circumstances, be acquired by the lessee under this Act, is clear from the third paragraph of Sec. 12.

The Act contains no rule or provision on the question as to how frequently, or at what intervals, the acts of enjoyment by the dominant owner must occur; in the case of discontinuous easements, as, *e.g.*, a right of way, in order to satisfy the law as to prescriptive acquisition. The same remark is predicable of the corresponding provision of the English Prescription Act, which is substantially the same as the provision in this Act. In *Earl De la Warr v. Miles*,⁽²⁾ which was a case of a claim to a *profit à prendre* consisting of a right to cut and carry away brakes, fern, heather and litter, preferred under the 60 years rule in Sec. 1 of the Prescription Act of 1832,⁽³⁾ BRETT, L. J., in his judgment, said: "I think it is necessary for the defendant to shew that the right was exercised year by year, and that if, as regards some part of the intermediate period, he failed to shew that the right had been exercised, he would not prove that which lies upon him under the Statute." "I think that the evidence sufficiently shews that the defendant and his predecessors in title did, by their servants, cut the litter from year to year during the whole period." But JAMES, L. J., in a supplement to his judgment, said: "I think also that it requires some further consideration before we entirely adopt what was said in one of the cases,—that to establish, under the Statute a claim to a *profit à prendre* it must be shewn to have been exercised in every one of the years. If from any accident, or if merely for the convenience of the man himself, the right was in some years not exercised, I think it deserves consideration whether such a pretermission as that

Enjoyment required in the case of discontinuous easements.

(1) *Chamber Colliery Co. v. Hopwood*, L. R., 32 Ch. D. 549, 559.

(2) L. R., 17 Ch. D. 535. See at p. 593.

(3) The terms of the requirement in that enactment as to the enjoyment are that the profit or benefit "shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of sixty years." See Appx. V.

would defeat the right if the user was shown to have begun more than sixty years ago, and to have continued whenever it was wanted during the whole sixty years.”⁽¹⁾ In the subsequent case of *Hollins v. Verney*⁽²⁾ the claim was, under Sec. 2 of the Prescription Act of 1832, to a right of way. The facts were that the way had been used by the claimant for the removal of timber and underwood cut upon an adjoining close belonging to him. The cuttings of the wood took place at intervals of fifteen years, the last having been in the year in which the action was commenced, the next previous cutting fifteen years before that and the third previous cutting, which was the earliest, fifteen years before the second, and the removals of the wood took place on the same three respective occasions. Between these intervals the road was occasionally stopped up, but the claimant used it without opposition on each occasion on which his cuttings and removals of wood were taking place. It was held that the claim failed, as the enjoyment did not fulfil the requirements of the Act (Sec. 2) which are that the way “shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years.” The Divisional Court (whose judgment was affirmed on appeal) quoted with approval and partly relied on an opinion expressed by PARK, B., in the course of the argument in *Lowe v. Carpenter*,⁽³⁾ which was in these words: “The Statute can hardly be taken to apply to cases where the rights mentioned in it are used at intervals of two or three years; for in such cases a party could not acquiesce for one year under the 4th section, if ‘the act or matter’ is done only at intervals of two or three years.” They also relied upon *Parker v. Mitchell*⁽⁴⁾, and *Bailey v. Appleyard*⁽⁵⁾, both cases of claims to a discontinuous servitude. The judgment of the Court of Appeal in this case (*Hollins v. Verney*) after commenting on the

(1) L. R., 17 Ch. D., p. 600.

(2) L. R., 11 Q. B. D. 715; 13 Q. B. D. 304.

(3) 6 Exch. 825; see at p. 827.

(4) 11 A. & E. 788.

(5) 8 A. & E. 161; L. J., 7 N. S., Q. B. 145.

previous decisions of importance on, and bearing on, the question at issue, resolves it in these words: "It is difficult, if not impossible, to enunciate a principle which will reconcile all the decisions, and still more all the *dicta* to be found in them; the only safe course is to fall back on the language of the Statute, to give effect to it, and to introduce into it nothing which is not to be found there. It is sufficient for the present case to observe that the Statute expressly requires actual enjoyment as of right for the full period of twenty years before action. No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the Statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the Statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended. Can an user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot; that it is not, and could not reasonably be treated as, the assertion of a continuous right to enjoy; and when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the Statute. Without therefore professing to be able to draw the line sharply between long and short periods of non-user, without holding that non-user for a year or even more is necessarily fatal in all cases, without attempting to define that which the Statute has left indefinite, we are of opinion that no jury can properly find that the right claimed by the defendant in this case has been established by evidence of such limited user as was mainly relied upon, and as was contended by the defendant to be sufficient in the present

case.”⁽¹⁾ In *Parker v. Mitchell*, it was held that a plea of forty or twenty years user of a way, under the Prescription Act of 1832, Sec. 2, is not sustained by proof of user during a period of fifty years immediately preceding the commencement of the suit with the exception of the last four or five years of that period, no evidence of actual user during those last four or five years before the suit being given, and that a presumption of a continuation of user after the time during which there was proved to have been actual user did not satisfy the Statute. In *Bailey v. Appleyard* a claim to a *profit à prendre*, viz. a right of pasture, under the thirty years rule in Sec. 1 of the Prescription Act of 1832, was held to be not sustained by proof of user for twenty-eight years immediately preceding the commencement of the suit, there having been no user during the twenty-ninth and thirtieth years before the suit owing to the erection of a chain which prevented it; though it was proved that there was actual user also before the erection of the chain, which caused its cessation during those two years. In this case, as well as in *Hollins v. Verney*, the Court partly based their decision on the 6th section of the Act, which provides that “no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act, as may be applicable to the case and to the nature of the claim.” In *Hollins v. Verney*, COLERIDGE, C. J., observed, of the right claimed in that case that though “it did not appear to him to be an easement capable of being claimed under the Prescription Act of 1832,” it was, “he apprehended, an easement capable of being claimed at common law if the evidence supported it.”⁽²⁾ In *Carr v. Foster*⁽³⁾ (decided in 1842), in which both *Parker v. Mitchell* and *Bailey v. Appleyard* were referred to in the argument, it was held that a right of pasture

(1) L. R., 13 Q. B. D. 315.

(2) L. R., 11 Q. B. D. 718.

(3) 3 Q. B. 581.

claimed under the thirty years rule in Sec. 1 of the Prescription Act of 1832 could be established by proof of continued actual user for a period of thirty years and more next before the commencement of the action except for two years, in about the middle of that period, during which there had been no user. DENMAN, C. J., in his judgment, said "I am of opinion that the thirty years enjoyment was sufficiently made out. There must be some interval in the enjoyment of all such rights; and it must be a question for the jury, in each case, whether the right was, substantially, enjoyed for the requisite period. It has been ingeniously argued that a thirty years enjoyment cannot have taken place where there has been a two years intermission. But the words of Sec. 1 are "without interruption," not "without intermission." And the intermission must be a matter open, in every case, to explanation. Sec. 6 enacts that "no presumption shall be made in favor of any claim, on proof of the right having been exercised for a less period than that prescribed by the Act in the particular case. But that provision is meant only to encounter presumptions, from an exercise of the right during such an imperfect period, that it was exercised in older times. The effect of the clause is, that a claimant, proving enjoyment for less than the specified time shall not, on that ground, carry back his right to a period before that which his proof extends to. But this does not affect the mode of proof: and where actual enjoyment is shewn before and after the period of intermission, it may be inferred from that evidence that the right continued during the whole time." In *Hollins v. Verney* the only judge who referred to *Carr v. Foster*, MANISTY, J., expressed his opinion, but purely as *obiter dictum*, that the decision in *Carr v. Foster* was good law.⁽¹⁾

No easement can be acquired by prescription of any kind—either immemorial user, or user raising the fictitious presumption of a lost grant, or statutory prescription—against a lessee, or tenant for life, or person holding any other

"The right
... shall be
absolute."

(1) L. R., 11 Q. B. D. 720.

limited interest in the burdened tenement, *only*. It must be acquired against him who is the reversioner and absolute owner⁽¹⁾, as well as against such lessee, tenant for life, or other limited owner, or not at all. In *Bright v. Walker*⁽²⁾ it was held that a right of way could not be acquired under the Prescription Act (Sec. 2) against the lessee for lives of a tenement without being acquired against the reversioner, the lessor, also, and as the lease had not expired and consequently no right had been acquired against the reversioner, who has, under the Act, three years from the expiration of the lease within which he may dispute the right, no right had been acquired against the lessee by the plaintiff, though he had had uninterrupted enjoyment of the way, claiming as of right, for more than twenty years. In the judgment of the Court of Exchequer delivered by him PARK, B., said: "In the first place, the Statute is "for the shortening the time of *prescription*"; and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. And, in the next place, the Statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute—valid as to some persons, and invalid as to others. From hence we are led to conclude that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good as against any one, and, therefore, not against the defendant."⁽³⁾ So, in *Wheaton v. Maple & Co.*,⁽⁴⁾ it was held that the plaintiff, who had enjoyed for more than forty years without

(1) And against intermediate reversioners, if any, (having limited estates or interests in reversion).

(2) 1 C., M. & R. 211.

(4) L. R., 1893, 3 Ch. 48.

(3) 1 C., M. & R. 221.

interruption the access of light to the windows of his house passing over the premises of the defendant, who was a lessee under the Crown, had not acquired a right to light against the defendant, as such lessee, under the Prescription Act, because such a right cannot be acquired against the Crown under that Act, and in order that a right to light may be acquired under that Act it must be acquired against the owner of the servient tenement and not merely against a tenant thereof. LINDLEY, L. J., in his judgment in that case said : " An easement for a term of years may, of course, be created by grant ; but such an easement cannot be gained by prescription, and, not being capable of being so acquired, it does not fall within the scope of the Statute 2 & 3, Will. 4, c. 71. The expression 'absolute and indefeasible', as applied to easements of all kinds, coupled with the declared object of the Act, which is to shorten the time for prescription, shews that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for ever on the servient tenement." (1) And LOPES, L. J., in his judgment said : " Absolute and indefeasible means absolute and indefeasible against the whole world. Unless the enjoyment gives a title against all persons having any interest in the *locus in quo*, it gives no title at all : *Bright v. Walker* (2). *Frewen v. Phillipps* (3) in no way conflicts with *Bright v. Walker*, for the title there acquired was absolute and indefeasible, being good against the reversioner and every person having any interest in the *locus in quo*." (4) To the same effect was the decision in *Simper v. Foley* (5), in which Sir W. PAGE WOOD, V. C., in his judgment said : " Where a right to an easement of this description [a right to light under Sec. 3 of the Prescription Act] is acquired against the owner of a leasehold interest in the servient tenement, it is acquired against all the world, and, therefore, against the owner of the reversion ; consequently by the merger of the

(1) L. R., 1893, 3 Ch. 65.

(2) 1 C., M. & R. 211.

(3) 11 C. B., (N. S.) 449.

(4) L. R., 1893, 3 Ch. 68.

(5) 2 John. & Hem. 555.

leasehold interest in the reversion of the servient tenement, the rights of the owner of the dominant tenement remain unaltered.”⁽¹⁾ Under the Easements Act a prescriptive title to an easement (which is an “absolute” right, *i.e.* a right against the whole world) could not be acquired while the burdened tenement is in the possession of a tenant for life or a tenant for a term of years exceeding three years nor until the expiration of three years after the end of such possession, because, as during this period it could not be acquired against the reversioner, it could not be acquired against any one.⁽²⁾ This proposition holds good even in the cases of easements of light, of air, and of support, in which cases the user is not required to be as of right, because Sec. 16 applies to all easements. It is otherwise in the case of an easement of light under the English Prescription Act, because Sec. 8 of that Statute does not apply to easements of light.⁽³⁾ In case of the burdened tenement, however, being, during the twenty years prescriptive period, held by one or more tenants under successive leases none of which exceeds three years in duration, an easement of light, or of air, or of support can be acquired under Sec. 15 of this Act, against the tenant as well as the absolute owner of such tenement, (and against all other persons), while such tenement is being held by such a tenant.⁽⁴⁾

Statutory prescriptive title must be established in a suit.

The fifth paragraph of the section renders it impossible to acquire a statutory prescriptive title to an easement, unless and until the claim thereto has been contested in a suit. This provision of the Easements Act, which is also contained in the Limitation Acts of 1877 and 1871, differs from the corresponding provision in the English Prescription Act of 1832 (Sec. 4), which requires that the periods of prescriptive

(1) 2 John. & Hem., 564.

(2) See Sec. 16; *Wheaton v. Maple & Co.*, L. R., 1893, 3 Ch. 48.

(3) See Appendix V; *Wheaton v. Maple & Co.*, L. R., 1893, 3 Ch. 48, and especially at p. 66 (per LINDLEY, L. J.); *Simper v. Foley*, 2 John. & Hem. 555; *Freven v. Phillips*, 11 C. B. (N. S.) 449; *Mitchell v. Cantrill*, L. R., 37 Ch. D. 56; *Robson v. Edwards*, L. R., 1893, 2 Ch. 146; *Ladyman v. Grave*, L. R., 6 Ch. App. 763.

(4) See Sec. 16 of this Act.

user shall be immediately before the suit or action. In *Koylash Chunder Ghose v. Sonatun (Hung Barooie)*,⁽¹⁾ a suit to establish a right of passage of boats over the defendant's land when it was covered with water during the rainy season, the first obstruction by defendant to the way had occurred about one year and ten months before the suit, and there had been no actual exercise of the right of way within two years before the suit. It was held that there might nevertheless have been *enjoyment* (which was what the enactment governing the case, Act XV of 1877, Sec. 26, required) within two years before the suit, this being a discontinuous easement. The right could only be exercised during the two or three months in the year when defendant's land was flooded, and if in any season there was a failure of the rain the right might not be exerciseable at all for twenty or twenty-one months; yet so long as the plaintiffs' exercise of the right, whenever they had occasion to exercise it, was not obstructed, their enjoyment must be considered as continuing. *Illustration (b)* to Sec. 26 of Act XV of 1877, which requires actual user in the case of a discontinuous easement, within the two years, was rejected, as being inconsistent with the section itself.

The twenty years of uninterrupted enjoyment must have elapsed before the suit is brought. It is not sufficient that, when the suit is brought, more than 19, though less than 20, years of such enjoyment have elapsed, and that therefore before there can be an interruption for one year the full period of 20 years necessary to make the plaintiff's title absolute will have expired.⁽²⁾

It has been held that when the acquisition of the statutory prescriptive right has been consummated by the decision of a Court, following upon the prescriptive user, the decision has a retrospective effect: the easement claimed is established

Decree establishing prescriptive easement has retrospective effect.

(1) I. L. R., 7 Cal. 132.

(2) *Lord Battersea v. Commissioners of Sewers for City of London*, L.R. 1895, 2 Ch. 708. See also *Bridewell Hospital v. Ward, Lock and Co.*, 62 L. J. (Ch.), 270.

as a right which existed from the commencement of the enjoyment. So that, if, *e.g.*, in a suit for injury done to the plaintiff's land, the defendant pleads justification on the ground of having acquired a prescriptive right to do the act complained of, and proves enjoyment in accordance with the requirements of the Statute, the act complained of though at the time when it was done it was unlawful becomes lawful by the decision of the Court that the defendant has acquired the prescriptive right pleaded. "It appears to us," said Lord ABINGER, C.B., in the judgment in *Wright v. Williams*⁽¹⁾ "that the Statute in question intended to confer, after the periods of enjoyment therein mentioned, a right from the first commencement, and to legalize every act done in the exercise of the right during their continuance."

If the claim to an easement is made, not under the statutory law, but on the ground of immemorial user, or of a grant to be presumed from user, proof of user within two years next before the suit, in an Indian case, or of user up to the suit, in an English case, is not necessary.⁽²⁾

The rule enacted in this paragraph must be taken subject to the rule enacted in Sec. 16; so that, if during a period ending immediately before, or within the two years next before, the commencement of the suit the tenement over which the easement is claimed was held by a tenant for life or a tenant for a term exceeding three years, the provisions of this paragraph will have been satisfied if the claimant of the easement proves twenty years enjoyment (of the character required by the Act) either before and up to the commencement of the tenancy for life or for years, or partly before and up

(1) 1 M. & W. 77, 99. This decision was followed in *Richards v. Fry*, 7 A. & E. 698, and *Ward v. Robins*, 15 M. & W. 237.

(2) *Arni Jagirdar v. Secretary of State for India*, I. L. R., 5 Mad. 226; *Kurupam Zemindar v. Merangi Zemindar*, I. L. R., 5 Mad. 253; *Maharani Rajroop Koer v. Syed Abul Hoossain*, I. L. R., 7 I. A. 240; I. L. R., 6 Cal. 394; *Punja Kuvarji v. Bai Kuvar*, I. L. R., 6 Bom. 20; *Achul Mahta, v. Rajun Mahta*, I. L. R., 6 Cal. 812; *Darling v. Clue*, 4 F. & F. 333, 334; *Koylash Chunder Ghose v. Sonatun Chung Barootie*, I. L. R., 7 Cal. 136; *Rameshar v. Koonj Behari*, I. L. R. 4 Cal. 633.

to and partly after the period of such tenancy for life or years, (as the case may be).⁽¹⁾ See also note to Sec. 16.

The sections of the English Prescription Act ^{Explanation} ^{I.} (2) relating to acquisition of easements and *profits à prendre* by prescription, (Secs. 1, 2, 3) contain a proviso in the following terms: "unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." In *Bewley v. Atkinson*,⁽³⁾ K, the owner of a house, in 1814 made four new windows in it, and signed and gave to S, the owner of an adjacent house overlooked by those windows, a document declaring that the windows were made and remained upon the leave of S, and that he, K, would, on the request of S or his heirs or assigns, at any time thereafter block up the windows, and in the meantime would pay S, his heirs and assigns, sixpence a year for the indulgence. The document was not signed by S. The sixpence per year was paid down to 1859. In 1877 S's successor in title called upon K's successor in title, who had bought the property in 1865 with notice of the document, to block up the windows, and proceeded to obstruct the access of light to them. Thereupon K's successor in title sued S's successor in title for an injunction, claiming to have acquired a right to access of light to the windows by prescription. It was held that the enjoyment of the light to the windows by K and his successors had been by virtue of the document, and that the document, though signed by K only, was an agreement within the meaning of Sec. 3 of the Prescription Act, and therefore prevented K and his successors from acquiring by prescription the right to the light claimed. The case was also decided upon the ground that, the plaintiff having succeeded to the house as a volunteer (by inheritance), and his immediate predecessor in title, his father, having, when he purchased

(1) *Clayton v. Corby*, 2 Q. B. 824. The claimant must "shew thirty years enjoyment" (the claim was there to a *profit à prendre* under the Prescription Act of 1832) "either wholly before the tenancy for life, if it be still subsisting, or partly before and partly after, if it be ended." (Judgment of the Court).

(2) See Appendix V.

(3) L. R., 13 Ch. D. 283.

it in 1865, had notice of the document, the agreement was binding upon the plaintiff. "A purchaser for value without notice," said JAMES, L. J., "would not be bound by it, but a volunteer or purchaser with notice is bound by it in exactly the same way as the original party was bound."⁽¹⁾ This latter ground of decision would hold good also in a case, similar in its facts, arising for decision under the Transfer of Property Act; see Sec. 40 of that Act.

In *Mitchell v. Cantrill* ⁽²⁾ T granted in 1864 to the plaintiff a lease of a house and a plot of land on which it had recently been built, with all rights and appurtenances "except rights, if any, restricting the free use of any adjoining land or the conversion or appropriation at any time hereafter of such land for building or other purposes, obstructive or otherwise." More than twenty years after that date the lessee of an adjoining piece of land under a lease of 1865 from the same landlord T, commenced to build on it in such a way as to obstruct the plaintiff's lights, which he had enjoyed since the date of his lease. It was held that the exception, above quoted, in the plaintiff's lease, though it withheld from the plaintiff the right which he would otherwise have had, from the lease itself, that the lessor should not derogate from his grant by building so as to obstruct the plaintiff's lights, did not affect the acquisition by the plaintiff of a right to the light by enjoyment for twenty years under the Prescription Act, s. 3, such exception in the lease not being a "consent or agreement" by which such enjoyment was had, within the meaning of the proviso at the end of that section. On the other hand, in *Haynes v. King*, ⁽³⁾ in which the leases of certain houses contained a provision that "notwithstanding anything herein contained, the said lessors shall have power, without obtaining any consent from or making any compensation to the said lessee, to deal as they may think fit with any of the premises adjoining or contiguous to the hereditaments hereby demised,

(1) L. R., 13 Ch. D. 293.

(2) L. R., 37 Ch. D. 56.

(3) L. R., 1893, 3 Ch. 439.

and to erect or suffer to be erected on such adjoining or contiguous premises any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now, or at any time during the term hereby granted, be enjoyed by the lessees or the tenants or occupiers of the hereditaments hereby demised," it was held that this provision in the lease prevented the plaintiffs, the lessees of the houses, from acquiring a right to light, against the lessors and their assigns, under s. 3 of the Prescription Act.

In *Sultan Nawaz Jung v. Rustomji Nanabhoy*⁽¹⁾ an agreement in writing containing a promise by A., who claimed a prescriptive easement of light for windows of his house against B., the owner of a house close to A.'s house, to the effect that whenever B. should raise his house A. would not object to having his windows blocked up, and an admission that B. was entitled to shut up A.'s said windows, and which agreement was made at or near the commencement of the period of A.'s enjoyment of the light, was held to be a bar to A.'s claim.

Where a former owner of the burdened tenement has, "by deed or writing," consented or agreed to or covenanted in favor of the enjoyment, a presumption does not arise that his successors in title had notice of, and were bound by, that consent, agreement or covenant, but the burden of proving that they had is upon him who sets up such consent, agreement or covenant in bar to the claim of a prescriptive title to an easement. In *Simpson v. Godmanchester Corporation*,⁽²⁾ in which a covenant by a former owner of the servient tenement in a deed of 1689 was so set up by the appellant as a bar to the respondents' claim to an easement to open the sluices of the appellant's locks upon a river in times of flood, Lord DAVEY said: "They [the appellant's counsel] further say it must be presumed that every owner of the navigation before the appellant had notice of the covenant, which it is

(1) I. L. R., 20 Bom. 704.

(2) L. R., 1897, A. C. 696.

proved that the appellant bought without notice. I do not think any such presumption ought to be made. The words of the statute are "unless it shall appear," &c., and I think that the burden of proof is on those who set up a written consent in opposition to an otherwise absolute and indefeasible right."⁽¹⁾

Explanation
II.
Interruption.

A spontaneous discontinuance of the enjoyment, though lasting for a year or more, is not an interruption; there must be an adverse obstruction to the enjoyment, and the discontinuance of enjoyment must be in consequence of such obstruction.⁽²⁾ And there must be a complete cessation of enjoyment throughout the year; if the enjoyment goes on at all, in spite of the obstruction, the interruption will not be such an interruption as is necessary for defeating a prescriptive claim. In *Earl De la Warr v. Miles*, in which the defendant claimed a *profit à prendre* of cutting and carrying away fern or litter, BRETT, L. J., said, "If it had been shewn that he or his predecessors had for a year or more submitted to tramps or gypsies, or other people who were undoubtedly trespassers, cutting the fern on their own account and appropriating it to themselves, and instead of cutting the litter by their own servants, had bought it from these people, as something which they had a right to sell—if it could have been shewn that he had done that for a year or two years without cutting any litter during that year, or those two years, by his own servants at all, I should have thought that there was a gap made in the user for sixty years, and that he could not succeed under this plea. If he had bought from such people in each year, but also in each year had cut a part by himself and his servants under a claim of right, the mere fact of his wrongful buying from these people would not, in my opinion, have destroyed the continuity of his actual user."⁽³⁾

In *Plasterers' Co. v. Parish Clerks Co.*⁽⁴⁾, the plaintiffs were

(1) L. R., 1897, A. C. at p. 709.

(2) *Carr v. Foster*, 3 Q. B. 581; *Sham Churn Auddy v. Tariney Churn Banerjee*, I. L. R., 1 Cal., 422, 429.

(3) L. R., 17 Ch. D. 693.

(4) 6 Exch. 680.

the owners of a house abutting on a yard of the defendants. The defendants had, by a deed, in 1669, granted to the then tenant of the plaintiffs' house leave and license to make four windows in the wall of the house facing the defendants' yard, at a rent of 10s. per annum for the license, for 51 years. These windows received light passing over the defendants' yard from 1670 down to 1848, when the defendants erected the building in the yard, obstructing the light, which gave rise to the suit. After the expiration of the 51 years license, there was no further deed or agreement in writing for the use of the lights, but the annual payment of rent for such use was continued. It was contended that this payment constituted an interruption of the enjoyment within the meaning of s. 4 of the Prescription Act, but the Court of Exchequer held it did not.

The obstruction, which will cause an interruption of the enjoyment, may be an obstruction by any third party and is not confined to obstruction by the owner of the tenement over which the benefit was being enjoyed.⁽¹⁾

In a suit for obstruction of light, if it appears on the plaintiff's evidence that there has been an interruption to the enjoyment from some structure of a permanent character, the *onus* is on plaintiff to prove that such interruption did not continue with his acquiescence for a year; but if the interruption was in its nature temporary and variable, as, *e.g.*, where it was caused by the defendant, a stonemason, from time to time piling up packing cases in which he had imported marble, and which were from time to time removed, the *onus* of proving that the interruption continued and was acquiesced in by the plaintiff for a year lies on the defendant.⁽²⁾

"In order to negative submission it is not necessary that the party interrupted should have brought an action or suit, or taken any active steps to remove the obstruction; it is

(1) See *Davies v. Williams*, 16 Q. B. 546; *De la Warr v. Miles*, L. R., 17 Ch. D., at p. 593 (*per* BRETT, L. J.)

(2) *Frestland v. Bingham*, L. R., 41 Ch. D. 268.

enough if he has communicated to the party causing the obstruction that he does not submit to, or acquiesce in, it. (See as to this *Glover v. Coleman*(1))”(2)

*Explanation
IV.
Easement to
pollute water.*

The rule laid down in *Explanation IV* as to easements to pollute water, might, it seems to me, have been properly extended to certain other easements, such as an easement to commit a nuisance by noise, and an easement to remove the natural support to land, in which cases also the user does not become adverse or prescriptive until the owner or occupier of the burdened tenement is prejudicially affected. See the note on *Sturges v. Bridgman*,(3) above, (page 92), and see *Blackett v. Bradley*.(4) The rule enacted in this *Explanation* is that which was laid down by the Court of Appeal in Chancery in *Goldsmid v. Tunbridge Wells Improvement Commissioners*,(5) affirming the judgment of the Master of the Rolls. The action was for a nuisance by discharging the sewage of a town into, and thereby polluting, a stream which flowed through the plaintiff's land, and the Commissioners pleaded a prescriptive right to do so. It was found on the evidence that the pollution had been gradually increasing with the increase of the population and houses of the town and consequent discharge of sewage, but that though the purity of the water had to some extent been affected for more than twenty years, pollution to such a degree as to render the water flowing through plaintiff's land unfit for use for domestic purposes had not existed for so long a period as twenty years; and it was held by the Court of Appeal that the prescriptive right set up "could be acquired only by a continuance of the discharge of the sewage prejudicially affecting the estate, at least to some extent, for the period of twenty years", and "that the evidence sufficiently shews that the discharge has not prejudicially affected the estate for so long a period."

(1) L. R., 10 C. P. 108.

(2) *Per* INNES, J., *Subramaniya Ayyar v. Ramachandra Rau*, 1 L. R., 1 Mad. 335, 339.

(3) L. R., 11 Ch. D. 852.

(4) 1 B. & S. 940.

(5) L. R. 1 Ch. App. 349, 352; 1 Eq. 161

Neither Sec. 27 of Act IX of 1871, nor Sec. 26 of Act XV of 1877, contained a provision making the prescriptive period in claims against the Government different to the period in other cases. In a case decided by the Bombay High Court⁽¹⁾ before the Easements Act came into force in that Presidency, the Court expressed the opinion, without actually deciding, that "Section 26 of Act 15 of 1877 is not applicable to a claim against the Secretary of State, on the ground of the well established rule in England, that the Crown, whose interests he represents, is not included in an Act unless there be words to that effect." The Court said: "The above rule of construction of Acts as regards the Crown relied on by the Advocate General would appear to be equally applicable here as in England, and it was so regarded by the Division Court consisting of WEST and NANABHAI HARIDAS, JJ., in *Ganpat Putaya v. The Collector of Kánara*⁽²⁾," in their judgment in which case their Lordships said: "It is a universal rule that prerogative and the advantages it affords cannot be taken away except by the consent of the Crown embodied in a Statute. This rule of interpretation is well established and applies not only to the Statutes passed by the British, but also to the Acts of the Indian Legislature framed with constant reference to the rules recognized in England." But in *Arzan v. Rakhal Chunder Roy Chowdhry*,⁽³⁾ a case decided by the Calcutta High Court under Act XV of 1877, the plaintiff, who claimed a right of way against the Secretary of State, and proved enjoyment—of the character required by the Act—of the way for 30 or 40 years, was held to have established his claim to the right of way.

When the property over which easement is claimed belongs to Government.

By the English law, a statutory prescriptive title to an easement of light cannot be acquired against the Crown, in-

(1) I. L. R., 14 Bom. 213, 218 (decided in 1889).

(2) I. L. R., 1 Bom. 7, 9.

(3) I. L. R., 10 Cal. 214. In that case, which came before the High Court of Calcutta, on Second Appeal, in 1883, one S. H. was the proprietor of the land over which the right was claimed, and the Government, the 2nd defendant, held a mukarrari sub-lease of the land obtained from a lessee under S. H. in 1855. The 1st defendant held the land under a sub-lease from the Government. Neither the proprietor of the land, nor his lessee, were parties to the suit.

asmuch as Sec. 3 of the Prescription Act⁽¹⁾ does not bind the Crown, and Sec. 2 of that Act does not apply to an easement of light.⁽²⁾

Light, Air, and
Support.

In the case of rights of way, and all other easements, except easements of light, air, or support, this section requires that the enjoyment, in order to be operative to give a prescriptive title, shall be "as of right" and also "open." But in the case of prescription for easements of light, or of air, or of support it does not require that they should have been enjoyed either "openly" or "as of right." The acquisition of easements of light, of air and of support by prescription is exceptional in this respect, that to prevent such acquisition of these easements the party on whose land the burden is sought to be imposed is put to expense, more or less considerable—*viz.* in the one case by erecting a wall or other erection obstructing the passage of light or air to the windows in question, in the other case by excavating or undermining in such a way as to take away the support of the building in question (without interfering with the support of the land in its natural state on which the building stands). In *Webb v. Bird*,⁽³⁾ WILLES, J., said, speaking of easements of light and of support; "all that can be said however of these cases is that, as compared with the general law, they are anomalous. In general a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shows that the party against whom the right is acquired might have brought an action, or done some act to put a stop to the claim *without an unreasonable waste of labor and expense.*" And in *Bryant v. Lefever*,⁽⁴⁾ BRAMWELL and BRETT, L. JJ., after citing, as applicable to the plaintiff in that case, who was claiming a right of uninterrupted access of air to the chimneys of his house, the observation of the judges in *Bury v. Pope*⁽⁵⁾

(1) 2 & 3 Will. 4, c. 71. See Appendix V.

(2) *Wheaton v. Maple & Co.*, L. R., 1893, 3 Ch. 48; *Perry v. Eames*, L. R., 1891, 1 Ch. 658.

(3) 10 C. B., N. S., p. 285.

(4) L. R., 4 C. P. D., p. 177.

(5) Cro. Eliz., 118.

that "it was his folly to build his house so near to the other's land," continued thus: "It may be said that if this reasoning is correct, it is applicable to lights; so it is to a great extent, and any one who reads the cases relating to the acquisition of a right to light will see that there has been great difficulty in establishing it on principle. WILLES, J., says, it is anomalous: *Webb v. Bird*; (1) and *per* BLACKBURN, J. *Webb v. Bird* (2)." And Lord BLACKBURN, in his judgment in *Dalton v. Angus*, after remarking, of an easement of support to a building, that "it seems much nearer in analogy to the right to the access of light to a window" than to a right to a prospect, supposing such a right could exist, continued thus: "perhaps if it were *res integra* one might doubt if it was expedient to protect an ancient window." (3)

The words "enjoyed therewith" do not render it necessary Light. that there should have been an actual personal enjoyment of the light, or even that the house through the windows of which the light passes should have been occupied, or completed so as to be fit for occupation. In *Courtauld v. Legh* (4) a house was structurally completed, the roof finished, the floors laid, and the windows put in, but the internal fittings, painting, papering and decoration had not been executed so as to make it fit for habitation. It was held that the words of English enactment relating to prescriptive acquisition of easements of light (Sec. 3 of the Prescription Act) (5) "when the access and use of light to and for any dwelling-house, workshop or other building shall have been *actually enjoyed therewith*," &c., did not mean that occupation of the building was necessary, and that when a house was in the condition above described, the owner of it could properly be said to actually enjoy the use and access of light to its windows, and therefore enjoyment in that sense for the statutory period gave a prescriptive title to the light under the Act. So, in

(1) 10 C. B., N. S., p. 285.

(4) L. R., 4 Exch. 126.

(2) 13 C. B., N. S., p. 844.

(5) 3 & 4 Will. 4, c. 71. See Appx. V.

(3) L. R., 6 App. Ca. 827.

Collis v. Laugher⁽¹⁾ it was held that time began to run in favor of the owner of a dwelling-house, for the purpose of acquisition of an easement of light to its windows, from the time when the house was completed for external purposes—the walls and the window apertures being finished and the building completely roofed in; though it was not then finished internally so as to be fit for habitation, (among other things remaining to be done) the sashes and glass of the windows not having been yet put in, nor the floors completely laid on the joists, nor the gas and water completely laid on. So, in *Pranjivandas Harjivandas v. Mayaram Somaldas*,⁽²⁾ it was held that the prescriptive period begins to run from the time when a dwelling-house, in respect of which the right is claimed, has assumed the appearance and outward aspect of a dwelling-house, though it was not completed or used as a dwelling-house for the full period.

The light must have been received through the same aperture or apertures, or an aperture or apertures in substantially the same position or respective positions. "It will not do, in order to establish a right, to shew that though at some time light did not come in through a particular access, at other times it did, and that sometimes it came in through one and sometimes through another opening in the building."⁽³⁾ The plaintiff was the occupier of a building, used for storing, seasoning, shewing to customers and selling timber, the walls of which were constructed of baulks of upright timber and cross-beams fastened thereto, with apertures between the uprights and cross-beams, through which, on the sides of the building which abutted on the defendant's premises, light passing over defendant's open yard was admitted into the plaintiff's building. The evidence went to shew that at one time the timber stored in the building would be so piled as to block the access of the light through one aperture, at another time it would be so piled as to

(1) L. R., 1894, 3 Ch. D., 659.

(2) 1 Bom. H. C. R., O. J. 148.

(3) *Per* COTTON, L. J., in *Harris v. De Pinna*, L. R., 33 Ch. D. 257.

block the access of the light through another aperture, so that the plaintiff failed to prove, in respect of any of the apertures, uninterrupted enjoyment of the same cone of light for the statutory period, and he was held not to have acquired an easement of light for the apertures.⁽¹⁾

The entrance of the light through the windows needs not be continuous; in the case of windows with moveable shutters, it is a sufficient user and access of the light, if the owner opens the shutters occasionally, at any time he pleases, for the admission of light, and if there is no such obstruction to, and interruption of, access over the servient land as would⁽²⁾ defeat the claim; and where it is proved that such windows have remained unchanged for twenty years, and that the shutters were so constructed that they might be opened or closed at the pleasure of the owner, the onus is thrown on the other party to prove that the right has not been gained.⁽³⁾

The term "ancient lights" is applied to windows in respect to which a prescriptive right to light has been acquired by twenty years or more of enjoyment.⁽⁴⁾

The generality of the words "to and for any building" would seem to admit claims to easements of light in respect of buildings, (provided they are structures permanently attached to the soil ^{"to and for any building."}⁽⁵⁾) in respect of which such a claim could not be maintained under the less general wording of the corresponding provision in the English Prescription Act (Sec. 3). "On the construction of that section," said CHITTY, J.,⁽⁶⁾ "seeing that the words are 'any dwelling-house, workshop, or other building,' it appears to me 'any building' must mean a building analogous to those mentioned, otherwise it would be useless to mention workshop or dwel-

(1) *Harris v. De Pinna*, L. R., 33 Ch. D. 238.

(2) Under s. 15, *Ezpl. II*, Easements Act, in India; s. 4, 2 & 3 Will. 4, c. 71, in England.

(3) *Cooper v. Straker*, L. R., 40 Ch. D. 21.

(4) See *per* KINDERSLEY, V. C., in *Turner v. Spooner*, 30 L. J., N. S., Ch. 302.

(5) See definition of 'land' in s. 4, *Explanation*.

(6) In his judgement in *Harris v. De Pinna*, L. R., 33 Ch. D. 246.

ling house particularly. It would have been enough to have said 'any building.' The section relates to the access and use of light to any buildings of a like nature with those which are described in the section itself." In the case in which these observations were made, the plaintiff claimed, under that enactment, a right to light in respect of a permanent structure, which was used for the storage, seasoning, and showing and selling to customers, of timber, and was constructed thus: the sides were constructed of solid upright baulks of timber fixed in stone bases built on solid brick piers, and of transverse beams fastened across the uprights, and diagonal iron bracings. There were floors or stages of solid planks, and the topmost floor was so constructed as to serve either as a roof or as an additional staging for timber. The apertures in respect of which a right to light was claimed were the spaces left between the uprights and the cross beams. CHITTY, J., held that this structure was not a 'building' within the meaning of Sec. 3 of the Prescription Act, and therefore dismissed the suit.⁽¹⁾

Air. As to a prescriptive right to air, see, further, note to Sec. 17.

Support. The question of the acquisition by prescription of a right of support to a building from adjacent land is one of great difficulty, and puts the severest strain on the principles on which the law of prescriptive acquisition of easements is based. It was the subject of a case, *Angus v. Dalton*,⁽²⁾ which was carried to the Court of Appeal, and then to the House of Lords, where, after taking the opinions, expressed in considered and elaborate judgments, of seven judges, the matter was elaborately dealt with and decided in the judgments of the Lord Chancellor and four other Lords of the Court of ultimate appeal. The difficulty is that, taking the law of prescription as based on the principle that the party over whose tenement the enjoyment is had, having the power of resisting that enjoyment, has failed to resist it, and that

(1) *Harris v. De Pinna*, L. R., 33 Ch. D. 238.

(2) L. R., 3 Q. B. D. 85; 4 Q. B. D. 162; 6 App. Cas. 740.

laches or acquiescence is therefore presumably attributable to him,⁽¹⁾ in the case of adjacent support to a building the owner of the adjacent land has, or ordinarily has, no practicable or reasonable means of resisting the enjoyment. "The adjoining owner," said COCKBURN, C. J.,⁽²⁾ "has no remedy or means of resistance,—unless, indeed, he should excavate in his own immediately adjacent soil while the neighbouring house is being built or before the easement has been fully acquired, for the purpose of causing the house to fall. But what would be thought of a man who thus asserted his right? Or, possibly, as in the present instance, he may have built to the extremity of his own land, and may require the support of his soil to uphold his own house. Is he to endanger and perhaps destroy his own house by excavating under it for the purpose of preventing his neighbour from acquiring the right of support?" It was on this ground—the inability of the defendant to resist the user by any reasonable means—that the majority of the Court of Queen's Bench Division, in that case, COCKBURN, C.J., and MELLOR, J., held that the easement of adjacent support to his factory which the plaintiff claimed on the strength of 27 years' enjoyment, had not been acquired, either independently of the Prescription Act of 1832 or under that Act (which makes claims to any easement except that of light defeasible on any ground on which they were defeasible before the Act); but they were overruled by the Court of Appeal and the House of Lords. Their Lordships of the House of Lords were all of opinion that the plaintiff had acquired the easement claimed by him, but the grounds on which they based their decisions respectively differed. Lord SELBORNE, L. C., was of opinion that it would not be consistent with the policy and purpose of the law in favor of possessory or prescriptive titles, that they should depend, in each particular case, upon the greater or less facility or difficulty, convenience or inconvenience, of practi-

(1) Lord BLACKBURN denied that this was the only, or even the chief principle, on which prescription rests; see below.

(2) L. E., 3 Q. B. D. 117.

cally resisting or interrupting them ; that the power of resistance did exist in cases of adjacent support to buildings and could be exercised when the adjoining owner wished, and found it for his interest, to make such a use of his land as would have that effect; and that "so long as it does not suit his purpose or his interest to do this, the law which allows a servitude to be established or enlarged, by long and open enjoyment, against one whose preponderating interest it has been to be passive during the whole time necessary for its acquisition, seems more reasonable, and more consistent with public convenience and natural equity, than one which would enable him, at any distance of time, (whenever his views of his own interest may have undergone a change) to destroy the fruits of his neighbour's diligence, industry, and expenditure."⁽¹⁾ Uninterrupted enjoyment, therefore, of the support for the period required by law, he thought, gave a prescriptive title to it, provided the enjoyment was not *vi* (forcible) nor *clam* (secret) nor *precario* (by license). "Of *vi*, or *precario*," he said, "there is here no question" (it was not disputed that the user was peaceable and as of right). On the question whether the enjoyment was *clam*, the enquiry, he said, was "as to the nature and extent of the knowledge or means of knowledge which a man ought to be shown to possess, against whom a right of support for another man's building is claimed. He cannot resist or interrupt that of which he is wholly ignorant. But there are some things of which all men ought to be presumed to have knowledge, and among them (I think) is the fact, that, according to the laws of nature, a building cannot stand without vertical or (ordinarily) without lateral support." When a new building is openly erected on one side of the dividing line between two properties, the Lord Chancellor observed, its exterior and much of its interior structure must be visible and ascertainable by the adjoining proprietor; and this is sufficient notice to him to satisfy the requirement that

(1) L. R., 6 App. Ca. 796, 797.

the user must not be *clam*; for even if he should not be able in this way to ascertain the details of the internal structure of the building upon which the exact amount or incidence of its weight may depend, he is bound to make inquiries if he desires information on these particulars, and it would only be if, on his so doing, information was improperly withheld from him, or false or misleading information was given to him, that a plea that the enjoyment was *clam* could be successfully set up. And, as in the case before the Court "everything was honestly and (as far as it could be) openly done, without any deception or concealment," Lord SELBORNE was of opinion that the kind and degree of knowledge which the defendant must necessarily have had was sufficient.⁽¹⁾ Lord PENZANCE thought that such an easement as that claimed could not be acquired consistently with any known principle of law, because the principle on which acquisition of easements by prescription or presumed grant rested was, in his opinion, that the person against whom the right was acquired had the power of resisting the enjoyment of the benefit without incurring extravagant or unreasonable loss or expense in so doing, and, having such power, failed to exercise it; and such power he did not possess in the case of the enjoyment of adjacent support to a building. He, however, thought (as did LUSH, J., in the Court of first instance) that the existing authorities shewed that this right of support to a building could be acquired by mere user, quite independently of any presumed acquiescence or grant on the part of the owner of the burdened tenement, and that the law being thus settled by a long series of decisions, the Court was bound by it, though those decisions were, in his opinion, irreconcilable with the principle under-

(1) L. R., 6 App. Ca. 800—802. The Lord Chancellor also thought, contrary to the opinions of all the judges in both the Courts below, and to that of most of the judges who assisted the House of Lords, that an easement of support to buildings is an easement within the 2nd section of the Prescription Act of 1832; but he admitted that under that enactment also it was necessary that the enjoyment should be neither *vi* nor *clam* nor *precario*.

lying the law of prescription.⁽¹⁾ Lord BLACKBURN, in a learned judgment, examined the foundations of the law of prescription. He was of opinion that the ultimate principle on which prescription is founded, is not the principle of acquiescence or laches inferred from non-interruption when there was the power to interrupt. That there is a more extensive principle underlying prescription, which is that it is for the public good, in the quieting of titles, "that the true owner should lose his rights if he has not exercised them during the prescribed period, whether there has been such laches or not," nor is there "much hardship" to him in this, for "presumably such rights if not exercised" for a long time "are not of much value, and though sometimes they are, '*ad ea quæ frequentius accidunt jura adaptantur.*'"⁽²⁾ That "the right to forbid digging near the foundations of a house without taking proper precautions to avoid injuring it, is one very little onerous to the neighbours, and one which it is expedient" should be acquirable by prescription, as much as the right to light is.⁽³⁾ That, taking the principle of the law of prescription to be the wider one above-mentioned, no more is requisite to give a prescriptive right to support of a building than that "the enjoyment be so open that it is known" by the adjacent owner "that some support is being enjoyed by the building."⁽⁴⁾ Lord WATSON expressed his opinion that a right to lateral support from the adjoining soil may be acquired for a building which has enjoyed that support peaceably and without interruption for the prescriptive period of twenty years.⁽⁵⁾ Lord COLERIDGE merely expressed concurrence in the conclusions arrived at by the Lord Chancellor and Lord BLACKBURN, and their reasons therefor.⁽⁶⁾

(1) L. R., 6 App. Ca. 804—808. Lord PENZANCE also expressed his opinion that, if the matter was *res integra*, it would be reasonable that the law should allow a right to adjacent support to a building to be acquired as soon as the building was erected.

(2) L. R., 6 App. Ca. 817, 818, 828.

(3) L. R., 6 App. Ca. 827.

(4) L. R., 6 App. Ca. 828.

(5) L. R., 6 App. Ca. 830.

(6) L. R., 6 App. Ca. 790.

Under the Easements Act, the difficulty which presented itself in *Angus v. Dalton* cannot arise, because that Act does not require the enjoyment to be either open, or as of right, in the case of prescriptive acquisition of an easement of support. But the Limitation Act of 1877, and that of 1871, do require that the enjoyment, in the case of an easement of support, shall be open and as of right, and I have therefore referred, at some length, to that important English decision.

The same conditions which by the law of England are sufficient to create a prescriptive right to support to a building from adjacent land, are sufficient, by that law, to create such a right of support to a building from an adjoining building.⁽¹⁾ So, in this section, the law of prescriptive acquisition of support from things attached to the adjoining land is made the same as that of support from the adjoining land. In both cases, then,—support to buildings from land, and support to buildings from buildings—the English law does, but the Indian law does not, require that the enjoyment should be open.

Support of
building from
building.

‘Building’ means structure permanently affixed to the soil, and does not include a removeable building,⁽²⁾ however long it may have stood unremoved. The insertion in the Act of a definition of the word was, in this respect at least, unnecessary, as by the definition of ‘easement’ in Sec. 4 the dominant tenement must be land or something permanently attached to the earth. “Building.”

A right to have boughs of a tree projecting over a neighbour’s land, or to have roots of a tree extending into or through such land, cannot be acquired by prescription.⁽³⁾ “According to our law,” said LINDLEY, L. J., in *Lemmon v. Webb*,⁽⁴⁾ “the owner of a tree which gradually grows over his neighbour’s land is not regarded as insensibly and by

Boughs of
tree projecting
over neigh-
bour’s land.

(1) *Lemaitre v. Davis*, L. R., 19 Ch. D. 281.

(2) such as the building in *Maberley v. Dowson*, L. J., 5 K. B. 261.

(3) *Lemmon v. Webb*, L. R., 1894, 3 Ch. 1, (confirmed on appeal to H. L.) L. R. 1895, A. C. 1; *Hari Krishna Joshi v. Shankar Vithal*, I. L. R. 19 Bom. 420.

(4) L. R. 1894, 3 Ch. 12. See also L. R. 1895, A. C. 6 (per Lord HERSCHELL, L. C.)

slow degrees acquiring a title to the space into which its branches gradually grow. Considering that no title is acquired to the space occupied by new wood, and that new wood not only lengthens but thickens old wood, and that new wood gradually formed over old wood cannot practically be removed as it grows, and considering the flexibility of branches and their constant motion, it is plain that the analogy sought to be established between an artificial building or projection hanging over a man's land and a branch of a tree is not sufficiently close to serve any useful purpose." The following passage from Gale on Easements⁽¹⁾ was quoted with approval by LINDLEY and LOPES, L.JJ., in *Lemmon v. Webb*⁽²⁾: "There appears to be no authority in the English law, that, in the absence of express stipulation, an easement can be acquired by user, to compel a man to submit to the penetration of his land by the roots of a tree planted in his neighbour's soil. The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it."

Temporary artificial water-courses.

An easement cannot be acquired by prescription in an artificial watercourse which is of a temporary character, as, e.g., a sough made for draining off water from a mine, as against the owner of the land in which the stream is originated. The reason of this is to be found in the principles, above commented on, that, in order to create a title by prescription to an easement, either independently of the statutory law, or under this Act (except in the cases of light, air and support), the person against whom the right is claimed must be able to interrupt the enjoyment without doing for that purpose what he cannot reasonably be expected to do, and that the enjoyment must (except in those three cases) be as of right. In *Arkwright v. Gell*⁽³⁾ the plaintiffs, mill-owners,

(1) 6th ed., p. 461.

(2) L. R. 1894, 3 Ch. 14, 15.

(3) 5 M. & W. 203. See also *Greatrex v. Hayward*, 8 Exch. 291, in which the watercourse was a drain made for the purposes of agricultural improvement of the defendant's land.

and their predecessors in title, had, for about sixty years preceding the suit, used, for the working of their mill, the water of a sough which had been constructed in land not belonging to the plaintiffs for the purpose of draining certain mines. It was held that they had not acquired an easement to use the water of the sough. The Court, in their judgment, said, "What then is the species of right or interest, which the proprietor of the surface, where the stream issued forth, or his grantees, would have in such a watercourse, at common law, and independently of the effect of user under the recent Statute, 2 & 3 Will. 4, c. 71? He would only have a right to use it for any purpose to which it was applicable, so long as it continued there. An user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity; for such a grant would, in truth, be neither more nor less than an obligation on the mine-owner not to work his mines by the ordinary mode of getting minerals, below the level drained by that sough, and to keep the mines flooded up to that level, in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners could have meant to burthen themselves with such a servitude, so destructive to their interests: and what is there to raise an inference of such an intention? The mine owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely; a course so expensive and inconvenient, that it would be very unreasonable, and a very improper extension of the principle applied in the case of lights, to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity, as a matter of right. It remains to be considered whether the Statute 2 & 3 Will. 4, c. 71, gives to Mr.

Arkwright and those who claim under him any such right; and we are clearly of opinion that it does not. The whole purview of the Act shows that it applies only to such rights as would before the Act have been acquired by the presumption of a grant from long user. The Act expressly requires enjoyment, for different periods, *without interruption*, and therefore necessarily imports such an user as could be *interrupted* by some one "capable of resisting the claim;" and it also requires it to be "of right." But the use of the water in ~~this~~ case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford sough, and was incapable of interruption by them at any time during the whole period, by any reasonable mode; and as against them it was not "of right;" they had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it."⁽¹⁾ The case of *Wood v. Waud*⁽²⁾ was similar to *Arkwright v. Gell*, except that the action was brought, not against the originator of the watercourse, but against the owner of land through which the watercourse passed after having issued from the land in which it had its origin and before it reached the plaintiffs' land, for diversion of the water. This watercourse had been in existence and its water used by the plaintiffs for the working of their mill for sixty years. It was held that the plaintiffs had no right to the water as against the intermediate landowners, the defendants, and therefore no right of action against them for diverting and preventing the water from flowing on into the plaintiffs' land. Whether an artificial watercourse is of a permanent or temporary character, is a question which depends upon the purpose for which and the circumstances under which the watercourse was made. In *Gaved v. Martyn*⁽³⁾ the Court, in

Permanent
artificial
watercourses.

(1) 5 M. & W. 231, 233.

(2) 3 Exch. 748, 778, 779.

(3) 19 C. B. (N. S.) 732, 759.

their judgment, said: "If it be proved that the stream was originally intended to have a permanent flow, or if the party by whom or on whose behalf the artificial stream was caused to flow is shewn to have abandoned permanently, without intention to resume, the works by which the flow was caused, and given up all right to, and control over, the stream, such stream may become subject to the laws relating to natural streams." In *Beeston v. Weate*⁽¹⁾ a water-course made for irrigating land and for the watering of cattle was held to be made for purposes which were not temporary in their nature. An easement can, it has been held,⁽²⁾ be acquired to surplus water discharged from an artificial tank, through a sluice, and flowing onward in a defined course.

The statutory mode of prescriptive acquisition of easements introduced by the Limitation Acts and the Easements Act has not done away with the modes of acquisition by immemorial user, and by user for twenty years raising the presumption of a lost grant (see below); and on this account, as well as because questions as to easements having been acquired before the statutory mode was introduced may still arise, it is material to know how a title may be acquired by immemorial user, or by the doctrine of a lost grant. "At the common law" (of England) "there appears to have existed no fixed period of prescription. Rights were acquired by prescription when possession or enjoyment had existed beyond the memory of man, or where, as the legal phrase was, 'the memory of man ran not to the contrary.' But by several Statutes, fixed periods were limited for the bringing of actions for the recovery of real estate."⁽³⁾ Prior to the Statute of Merton the limitation in a writ of right was from the time of Henry I. By the Statute of Merton (20 Hen. III, c. 8) the limitation in a writ of right was from the time

The non-statutory modes of making out a title to easements. User from time immemorial. Presumption of grant from user.

(1) 5 E. & B., 986, 997.

(2) *Rayappan v. Virabhadra*, I. L. R., 7 Mad. 530. See also *Mallik Jawad-ul-Huq v. Ram Prasad Das*, 3 Beng. L. R., A. C., 281; *Kartik Chandra Sirkar v. Kartik Chandra Dey*, 3 Beng. L. R., A. C. 166; *Rup-chandra Ghose v. Rupmanjari Dasi*, 3 Beng. L. R., A. C. 325.

(3) *Per COCKBURN, C. J.*, in *Angus v. Dalton*, L. R., 3 Q. B. D. 103.

of Henry II, a period of seventy years. By the Statute of Westminster, 3 Edw. I, c. 39 (1275), the time for bringing a writ of right was limited to the time of King Richard I, a period of eighty-eight years. "It is plain," said COCKBURN, C.J., "that this Statute had reference to actions for the recovery of real estate. Nevertheless the judges with that assumption of legislative authority which has at times characterised our judicature, proceeded to apply the rule as to prescription established by the Statute to incorporeal hereditaments, and, among others, to easements. As might have been foreseen, as time went on, the limitation thus fixed became attended with the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence. But here again, the legislature not intervening, the judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory, that is to say, from the time of Richard I."⁽¹⁾ "The Statute of 21 James I, c. 16, which limited the time for bringing a possessory action to twenty years, led soon afterwards to a very important change in the law by the arbitrary adoption of that period by the Courts as sufficient to found the presumption of the existence of a right from the time of legal memory. Here, again, the boldness of judicial decision stepped in to make up for defects in the law, which the supineness of the legislature left uncared for. But it is to be observed, that with all their desire to reduce the period of prescription within reasonable limits, the Courts never gave greater effect to length of enjoyment than that of affording a presumption of prescriptive right, capable of being rebutted by proof of an origin at a time later than that of legal memory. Hence, if in the course of a cause it appeared that the disputed right had had a later origin, the presumption failed, and the claim

(1) L. R., 3 Q. B. D., 104.

of right was defeated.⁽¹⁾ The frequency of this result gave rise to a new device. As, independently of prescription, every incorporeal hereditament must have had its origin in grant, the fiction was resorted to of presuming after long user a grant by a deed which in lapse of time had been lost. At first, to raise this presumption it was required that the user should be carried back as far as living memory would go; but after the Statute of James I, c. 21, user for twenty years was—here again without any warrant of legislative authority, and by the arbitrary ruling of the judges—held to be sufficient to raise this presumption of a lost grant, and juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction.”⁽²⁾

A right to a pew, as appurtenant to a dwelling-house, may be acquired by prescription, which supposes a lost faculty; and even though the alleged right had its origin since the time of legal memory, and though in its inception it rested on a foundation invalid in law, yet a subsequent validation of the title by the grant of a faculty may be presumed from proof of exclusive possession and repairing of the pew by the claimant and his predecessors for a period extending back beyond the period of living memory.⁽³⁾ In *Philipps v. Halliday*⁽⁴⁾ the owner of a dwelling-house, of which he and his ancestors had been in possession from 1680 or earlier to 1888, when the suit was brought, at first as leaseholders, but from 1687, when the freehold was acquired, as freeholders, claimed the exclusive right to a pew in the parish church as appurtenant to the house. The evidence showed that the original title by which, in 1680, the then ancestor

(1) And this is still so: see *Wheaton v. Maple & Co.*, L. R., 1893, 3 Ch. at pp. 62, 67, 69; *Duke of Norfolk v. Arbutnot*, L. R. 5 C. P. D. pp. 392, 393.

(2) L. R., 3 Q. B. D. 105.

(3) *Philipps v. Halliday*, L. R. 1891, A. C. 228; 23 Q. B. D. 48; *Bedle v. Beard*, 12 Rep. 195. See also *Stocks v. Booth*, 1 T. R. 428; 1 R. R. 241; *Kenrick v. Taylor*, 1 Wils. 362; *Fuller v. Lane*, 2 Addams 419; *Walter v. Gunner and Drury*, 1 Hag. Con. 314.

(4) L. R., 1891, A. C. 228; 23 Q. B. D. 48.

of the plaintiff acquired the alleged right, was invalid in law. But the evidence also showed that the plaintiff and his predecessors in the ownership of the house had for more than seventy years next before the suit had the exclusive occupation of the pew, kept it locked (when not in use) by a key of which they had possession, and done repairs to it. It was held that this long-continued possession, coupled with these acts, which would have been illegal unless there had been a faculty, raised the presumption of a lost faculty granted subsequently to 1680, whereby the title, originally invalid, had been made valid.

The judgments in this case emphasize the importance of the principle that where there has been long-continued possession consistent with a legal title, every reasonable presumption ought to be made in favor of such possession as being based on a legal title.⁽¹⁾ And this principle was reaffirmed and acted on in *Simpson v. Godmanchester Corporation*⁽²⁾, in which the defendants, the corporation, were held to have acquired, by a grant which must be presumed, an easement to open in times of flood or likelihood of flood the sluices of certain locks, belonging to the plaintiff, on a river, in order to prevent damage, from inundation, to certain lands adjacent to the river, of which they were the owners, and which were liable to be submerged when the river was in flood; they having so far back as living memory went, and, as there was ground for inferring, for a period anterior to living memory, exercised the alleged right of so opening these sluices.

To sustain a presumption of a lost faculty granting a right to a pew in a church to the owner of a house, as such, something more than mere undisturbed possession for a period ex-

(1) See also *Lee v. Johnstone*, L. R., 1 Sc. & Div. App. 426, 435 (per Lord WESTBURY). And see *Goodman v. Mayor of Saltash*, L. R., 7 App. Ca. 633; *Haigh v. West*, L. R., 1893, 2 Q. B. 19; *Attorney-General v. Wright*, L. R., 1897, 2 Q. B. 318.

(2) L. R. 1896, 1 Ch. 214 (Court of Appeal); confirmed by H. L.: L. R., 1897, A.C. 696.

tending as far back as living memory can go is necessary.⁽¹⁾ Some acts of assertion of proprietary right in addition to possession must be shewn.⁽¹⁾ Such right to a pew carries with it the obligation to keep the pew in repair.⁽¹⁾ But proof of repairs having been done to the pew, by the claimant of the right or his predecessors in title, is not essential in order to justify the presumption of a lost faculty; repairs may not have been required within living memory; removal of the materials (woodwork) of a pew by the claimant of the right and substitution by him of chairs for the former seats was held to be an unequivocal act of ownership inconsistent with any right existing in the Ordinary, and, taken in conjunction with his and his predecessors' undisturbed possession during the period of living memory, to be sufficient to sustain the presumption of a lost faculty entitling him to the pew.⁽¹⁾

The nature of the enjoyment requisite for establishing a title either by immemorial enjoyment or by presumed lost grant⁽²⁾ is the same as that of the enjoyment required for giving a statutory prescriptive title; as to which see below. Neither the Limitation Acts and the Easements Act in India, nor the Prescription Act of 1832 in England,⁽³⁾ altered the pre-existing law, in this respect.

It has been held by the Privy Council that Act IX of 1871, while it gave a new mode of acquiring easements, was not prohibitory or exhaustive and did not exclude or interfere with the modes of acquiring easements which existed before the Act was passed; and that therefore, where a title to an easement could not be made out under

(1) *Stileman-Gibbard v. Wilkinson*, L.R. 1897, 1 Q. B. 749. Relining a pew was held, in this case, not to be an act of repair. In a previous case, *Pettman v. Bridger*, 1 Phillim. 316, lining a pew had been held not to be an act of repair, but merely ornament.

(2) The character of the enjoyment necessary for establishing title by either of these non-statutory modes is the same; see *Bryant v. Lefever*, L. R., 4 C. P. D. 177 (per BRAMWELL, L. J.); *Dalton v. Angus*, L. R., 6 App. Ca. 816 (per Lord BLACKBURN); *Chunilal Fulchand v. Mangaldas Govardhandas*, I. L. R. 16 Bom. 592, 595.

(3) *Bright v. Walker*, 1 C. M. & R. 219.

that Act, it could nevertheless be made out, if sufficient evidence of enjoyment was adduced, as their Lordships thought had been done in the case before them, for presuming the existence of a grant or covenant at some distant period of time whereby the right was created.⁽¹⁾ This decision holds good equally in regard to Act XV of 1877, that Act being, in this respect, similar to Act IX of 1871.⁽²⁾ It also holds good in regard to the Easements Act, there being nothing in this Act abolishing or prohibiting the modes of making a title to easements by immemorial user and by user raising the presumption of a lost grant.⁽³⁾ So, the English Prescription Act of 1832 did not, it has been held, put an end to the pre-existing modes of acquiring a title, by immemorial user, or by presumed lost grant.⁽⁴⁾ The presumption of a title by lost grant arises from twenty years' uninterrupted enjoyment as of right. Whether this presumption is a conclusive presumption of law, a *presumptio juris et de jure*, or is a presumption of fact and liable to be rebutted, is a question on which there have been conflicting decisions. In *Angus v. Dalton*, in the Queen's Bench Division, COCKBURN, C. J., held that the presumption was one of fact and rebut-

(1) *Muharani Rajroop Koer v. Syed Abul Hossein*, L. R., 7 I. A. 240, 246; I. L. R., 6 Cal. 394; see also *Arni Jaghirdar v. Secretary of State*, I. L. R., 5 Mad. 226; *Modhoooodun Dey v. Bissonauth Dey*, 15 Beng. L. R., 361, 366; *Kurupam Zemindar v. Merangi Zemindar*, I. L. R., 5 Mad. 255.

(2) *Punja Kuwarji v. Bai Kuvar*, I. L. R., 6 Bom. 20; *Kurupam Zemindar v. Merangi Zemindar*, I. L. R., 5 Mad. 253; *Juggut Chunder Roy v. Roop Chand Shaw*, I. L. R., 6 Cal. 811; *Arzan v. Rakhal Chunder Roy Chowdhry*, I. L. R., 10 Cal. 218; *Wutsler v. Sharpe*, I. L. R., 15 All. 270, 292.

(3) In *Modhoooodun Dey v. Bissonauth Dey*, 15 Beng. L. R., 351, 396, MARKBY, J., said: "It has indeed been contended that the Statute (His Lordship referred to Act IX of 1871) excludes other modes of acquiring an easement by enjoyment, but this is clearly not so. There are no words in the Statute to which such a construction can be given, and with the history of the English Prescription Act before them, it can scarcely be supposed that the Legislature here, had they intended any such exclusion, would have omitted to express their intention." These remarks appear to me to be equally applicable to the Easements Act.

(4) *Leconfield v. Lonsdale*, L. R., 5 C. P. 657, 726; *Aynsely v. Glover*, L. R., 10 Ch. Ap. 283, 285; *Dalton v. Angus*, L. R., 6 App. Ca. 800, 801 (per Lord SELBORNE, L. C.) and 814 (per Lord BLACKBURN); *Ponnusawmy Tever v. Collector of Madura*, 5 M. H. C. R. 21.

table by evidence proving that no grant could have been made, or that it is very improbable that a grant ever was made, or that if a grant was made, the right had necessarily been subsequently extinguished by a subsequent unity of seisin of the dominant and servient tenements, or otherwise, and he reviewed at great length previous decisions, and other authorities, in support of his opinion. LUSH, J., was also of opinion that the presumption was one of fact and rebuttable; though he thought that, in the case before the Court, no facts were shewn which were admissible to rebut the presumption of a grant, which in his opinion arose.⁽¹⁾ MELLOR, J., the remaining judge, expressed no opinion upon this point, but merely concurrence in the final conclusion arrived at by the Chief Justice, which was partly and primarily based on the ground that in his opinion, in the case before the Court, the presumption had not arisen at all, because the enjoyment, not being practically susceptible of resistance, was not of such a nature as to raise it. In the Court of Appeal, of the three judges forming the Court, BRETT, L. J., thought that the presumption was one of fact and rebuttable by proof, or an admission, either that a grant could not have been made, or that no grant was in fact ever made. THESIGER, L. J., was of opinion that uninterrupted enjoyment of an easement for twenty years raises the presumption of a lost grant, which is so far a presumption of law that it cannot be rebutted by proof that no grant was in fact ever made, but that it can be rebutted by proof that the presumed grantor was legally incompetent to make the grant or that the enjoyment was not of such a character as is necessary to establish the presumption of a lost grant. COTTON, L. J., agreed with the opinion of THESIGER, L. J. In the House of Lords, Lord SELBORNE, L. C.,'s judgment is for the most part taken up with shewing that an easement of support is within the 2nd section of the Prescription Act of 1832, and though he based his conclusion also on the presumption

(1) L. R., 3 Q. B. D., pp. 91—95.

of a lost grant from twenty years' user, he made no remark respecting such presumption, except this, that he agreed with the view of the authorities taken by LUSH, J., by the majority of the judges in the Court of Appeal, and by all the judges whose opinions had been taken by the House of Lords. Lord BLACKBURN was of opinion that, if the enjoyment is proved to have been such as to raise the presumption of a right by lost grant, this presumption cannot be rebutted by proof that there never was in reality any grant.⁽¹⁾ On the question whether such presumption is rebuttable by proof that the presumed grantor was legally incapable of making the grant, he expressed no opinion, but said: "No question here arises as to the effect of any disability on the part of the owner of the land."⁽²⁾ Lord PENZANCE gave no opinion on the point now under consideration, for he thought the right which was in question in the case, *vis.* an easement of support to a building, could not be gained either by prescription or by the presumption of a lost grant, but was gained by mere enjoyment for twenty years. The remaining two Judges in the case in the House of Lords, Lords COLERIDGE and WATSON, respectively expressed their concurrence in the conclusion arrived at by the other Judges of the House, that the plaintiff had acquired the easement of support claimed, but made no observation upon the question as to the nature of the presumption of a lost grant from twenty years' user. In *Bagram v. Khettranath Karformah*,⁽³⁾ a case decided upon the English law as it stood before the Prescription Act, PEACOCK, C. J., overruling the opinion of MARKBY, J., in the

(1) L. R. 6 App. C. 812—814. He disagreed with COCKBURN, C. J.,'s opinion that the jury were at liberty, after the presumption was raised, if they did not believe that there had in reality been a grant and chose to be scrupulous, to find that there was no grant. Although the fiction of a lost grant might have been, as COCKBURN, C. J., had said, a great judicial usurpation, yet when a long series of cases had established the law, to refuse to administer it because the mode in which it was introduced was not approved of, would, Lord BLACKBURN said, produce intolerable confusion, and would be at least as great a usurpation of the proper function of the Legislature as it was at first to introduce that fiction (pp. 812, 813).

(2) L. R., 6 App. Ca. 827.

(3) 3 Beng. L. R., O. C. 18, 48—53

lower Court, held that the presumption of a right by grant or Act of Parliament afforded by the twenty years' user is a presumption of law, which, unless negatived by evidence of legal incapacity of the presumed grantor or of unity of seisin of the two tenements or any other cause of extinction happening subsequently to the presumed grant, the jury or the Court (as the case may be) are bound to act on, whether they believe that such a grant or Act of Parliament ever *de facto* existed or not.⁽¹⁾ In a subsequent Calcutta case, also decided under the English law as it stood before the Prescription Act, COUCH, C. J., and MARKBY, J., held that the presumption of a lost grant is one of fact.⁽²⁾

As no actual grant of an easement can be legally made if the grantor is legally incapable of making it, so no grant can be presumed from user if at the time when the grant has to be presumed to have been made the then owner of the tenement over which the easement is claimed was legally incompetent to make the grant.⁽³⁾

In *Ponnusamy Tever v. Collector of Madura*,⁽⁴⁾ a case of a claim to an easement in the mufassal, decided in 1869, SCOTLAND, C. J., held that the length of time of uninterrupted user as of right which the claimant must show, to establish a presumption of lost grant, was, by analogy to the Indian Law of Limitation as to suits for recovery of land, twelve years. INNES, J., differing from SCOTLAND, C. J., was of opinion that "the circumstance of one year, one day, or even one hour may of course afford equally cogent evidence of a complete and absolute transfer of the right as an uninterrupted user for any length of time; and on the other hand, notwithstanding uninterrupted enjoyment for a lengthened

Period of enjoyment required for establishment of easement otherwise than under this Act or the Limitation Acts of 1877 and 1871.

(1) The Chief Justice cited, in support of this proposition, *Darwin v. Upton*, (2 Wms. Saund. 175c) where Lord MANSFIELD laid this down, and also the proposition that the presumption of immemorial user was not defeasible because the jury believed, without evidence to rebut it, that the enjoyment had not been ever since the time of Richard I.

(2) *Bhuban Mohun Banerjee v. Elliott*, 6 Beng. L. R., 85, 98, 102, 106.

(3) *Mill v. Commissioners of New Forest*, 18 C. B. 60; *Bagram v. Khettranath Karformah*, 3 Beng. L. R., O. C. 53 (per PEACOCK, C. J.)

(4) 5 Mad. H. C. R., 6, 31, 28.

period, circumstances may be put forward in evidence for the defence which without amounting to an interruption of the enjoyment may show that in fact there could have been no transfer of the right.”⁽¹⁾ And there are many Bengal decisions, on cases which arose in the mufassal, before Act IX of 1871 came into force, to the effect that enjoyment for twelve years may be (so far as the period of user goes) sufficient to establish a right of easement.⁽²⁾ In *Rupchandra Ghose v. Rupmanjari Dasi*⁽³⁾, KEMP and MARKBY, JJ., speaking of the previous decisions of the Calcutta High Court on this point, held “that there was no decision of that Court which said either on the one hand that a finding that the user had lasted for at least twelve years is necessary, or that such a finding of a user for twelve years would be conclusive.” In cases of claims to easements in Calcutta which arose for decision before Act IX of 1871 came into force, the English law as it stood independently of the English Prescription Act was held, by the Privy Council as well as by the High Court, to be applicable, and the English rule of presumption of a modern lost grant from twenty years’ user was accordingly applied to the decision of the cases.⁽⁴⁾ And in cases arising in the island of Bombay, before Act XIV of 1859 came into force, as well as after that and before Act IX of 1871 came into force, proof of enjoyment for twenty years was held, by the Bombay Supreme Court and High Court respectively, to

(1) See also the remarks of the same learned judge in reference to this case in *Subramaniya Ayyar v. Ramachandra Rau*, 1 L. R., 1 Mad. 338. And see *Krishna Mohun Mookerjee v. Jagornath Roy Jugi*, 2 Beng. L. R., A. C. 323; *Rupchandra Ghose v. Rupmanjari Dasi*, 3 Beng. L. R., A. C., 325, 328. See also remark of WESTBURY, L. C., in *Hanmer v. Chance*, 34 L. J., Ch. 416; *Bright v. Walker*, 1 C. M. & R. 232.

(2) *Joyprohash Singh v. Amir Ali*, 9 S. W. R. 91; *Mohim Chundra Chuckerbutty v. Chundi Churn Goohoo*, 10 S. W. R. 452; *Kartik Chandra Sirkar v. Kartik Chandra Dey*, 3 Beng. L. R., A. C. 166; *Krishna Chandra Chuckerbutty v. Krishna Chandra Banik*, 3 Beng. L. R., A. C. 211; *Kristo Chunder Chuckerbutty v. Kristo Chunder Burnick*, 12 S. W. R. 76; *Durga Churn v. Pearsee Mohun*, 9 S. W. R. 283.

(3) 3 Beng. L. R., A. C. 325. See also *Mullick Karim Buksh v. Harrihar Mandar*, 5 Beng. L. R., 174.

(4) *Bagram v. Khettranath Karformah*, 3 Beng. L. R., O. C. 18; *Bhuban Mohan Banerjee v. Elliott*, 6 Beng. L. R., 85; *confmd. on app.*, 12 Beng. L. R., 406; L. R., I. A., Suppl. Vol. 175.

be necessary for the establishment of a claim to an easement founded on enjoyment.⁽¹⁾ To establish a prescriptive title to an easement in the mufassal of the Bombay Presidency, proof of enjoyment for a period exceeding thirty years was required; Reg. V of 1827, Sec. 1, which provided that "whenever lands, houses, hereditary offices, or other immoveable property have been held without interruption for a longer period than thirty years, whether by any person as proprietor, or by him and his heirs, or others deriving title from him, such possession shall be received as proof of sufficient right of property in the same," being held to apply to incorporeal rights; ⁽²⁾ and that provision of that Regulation was held to be still applicable to such cases after Act XIV of 1859 came into force.⁽³⁾ That section (as well as the other sections of Chapter I to which it belongs) of Reg. V of 1827 was repealed by Act IX of 1871.

Neither an easement, nor a right in gross, can, by English law, be acquired by prescriptive user, or by way of presumed grant, by a large indefinite class of persons, as, *e.g.*, by the owners and occupiers of certain tenements some of which are copyhold and others freehold; ⁽⁴⁾ or by a fluctuating body of persons such as the inhabitants of a village, unless they have been formed into a corporation.⁽⁵⁾ Nor can the public acquire a *profit à prendre* by prescription or by the

Easements cannot be acquired by prescription by indefinite or fluctuating body of persons.

(1) *Pranjivandas Harjivandas v. Mayaram Samaldas*, 1 Bom. H. C. R. 148; *Narotam Bapu v. Ganpatrav Pandurang*, 8 Bom. H. C. R., O. C. 69; *Ramji Kesharji v. Jamnadas Khushaldas*, unreported, but referred to in last-mentioned case, 8 Bom. H. C. R. O. C. 75.

(2) But see observations in judgment in *Chunilal Fulchand v. Mangaldas Gowardhandas*, 1 L. R., 16 Bom. 595, 596.

(3) *Anaji Dattushet v. Morushet Bapushet*, 2 Bom. H. C. R. 334; and S. A. 391 of 1863, (unreported,) referred to in 2 Bom. H. C. R. 333, 334.

(4) *Tilbury v. Silva*, L. R., 45 Ch. D. 98, 118; *Gateward's case*, 6 Rep. 59b.

(5) *Mounsey v. Ismay*, 3 H. & C. 486; *Lord Rivers v. Adams*, L. R., 3 Ex. D. 361; *Goodman v. Mayor of Saltash*, L. R., 7 App. Ca. 633; see also *Haigh v. West*, L. R., 1893, 2 Q. B. 19. See, however, *Attorney-General v. Wright*, L. R., 1897, 2 Q. B. 318, 321, 322, 324.

presumption of a lost grant.⁽¹⁾ But in a Bombay case⁽²⁾ the High Court held that a right of grazing cattle on Government waste land could be acquired by prescription or by custom by the inhabitants of a village in the Bombay Presidency. The Court in their judgment said: "Assuming for a moment that Section 26 of Act XV of 1877 (which includes a profit à prendre in the term "easement") is not applicable to the Crown, it would be still open to the plaintiffs to establish their claim by the general law of prescription. See *Maharani Rajroop Koer v. Syed Abdul Hossein*⁽³⁾ and *Achul Mahta v. Rajun Mahta*⁽⁴⁾. The Advocate General has indeed urged upon us that a claim to a profit à prendre cannot be acquired by the inhabitants of a village either by custom or prescription. This is undoubtedly true by English law, unless where a grant can be presumed incorporating the inhabitants for that purpose—*Lord Rivers v. Adams*⁽⁵⁾; *Chilton v. Corporation of London*⁽⁶⁾; *Goodman v. Mayor of Saltash*⁽⁷⁾. Apart from considerations peculiar to English law, the main reason for the rule is the fluctuating character of the claimants, which from the possible increase of the number of claimants might practically operate to divest the owner of all the profits of his property; and it was on this ground that the ruling in *Lord Rivers v. Adams* was held applicable in *Lutchmeeput Singh v. Sadaulla Nushyo*⁽⁸⁾ to a claim by the tenants of a pargana to the right of fishing in the plaintiff's bhils. But however this might be as regards a claim to a profit à prendre of such a nature as that in question in *Lutchmeeput Singh v. Sadaulla Nushyo* and against indivi-

(1) *Gateward's case*, 6 Co., 59b; *Hudson v. MacRae*, 4 B. & S., 585; *Smith v. Andrews*, L. R., 1891, 2 Ch. 678, 699; see also *Neill v. Duke of Devonshire*, L. R., 8 App. Cas. 125, 154 (per Lord SELBORNE, L. C.); *Murphy v. Ryan*, I. R., 2 O. L. 155; *Blount v. Layard*, L. R., 1891, 2 Ch. 689 (per BOWEN, L. J.); *Goodman v. Mayor of Saltash*, L. R., 7 App. Cas. 648 (per Lord CAIRNS).

(2) *Secy of State for India v. Mathurabhai*, I. L. R., 14 Bom. 213.

(3) L. R., 7 I. A., 240.

(4) I. L. R., 6 Cal., 812.

(5) L. R., 3 Ex. D., 361.

(6) L. R., 7 Ch. D., 735.

(7) L. R., 7 App. Cas., at p. 641.

(8) I. L. R., 9 Cal., 698.

duals, the above objection cannot, in our opinion, be taken to a right of grazing by a village in this Presidency as against the Government. The right of free pasturage has always been recognized by Government as a right belonging to certain villages and must have been acquired by custom or prescription.”⁽¹⁾ Regarding the nature of “this right of free pasturage which certain villages enjoy according to the recognized custom of the country,” the Court said that it “does not necessarily confer the right of pasturage on any particular piece of land, although it may confer the right of having sufficient land set apart for the purposes of the village—a question which is not now before the Court,” and that in the absence of special circumstances shewing that such waste land was “used for grazing by the villagers in exercise of a right other than and independent of the above right, the user can only be properly referred to that general right.”⁽²⁾ It may be mentioned here, however, that it has been held by the Bombay High Court in a recent case⁽³⁾ that a suit by the inhabitants of a village in that Presidency claiming to have lands set apart for free pasturage for them is excluded from the jurisdiction of the Civil Courts by the Bombay Revenue Jurisdiction Act (Bom. Act X of 1876), Sec. 4, (f). In that case certain Government waste lands in the plaintiff’s village had been set apart by Government at the survey settlement in 1862-63 as free grazing land for the cattle of the village. Before that the villagers had had, for free grazing, part of the Government waste land, but whether the identical piece of land which was set apart for them at the survey settlement the evidence did not shew. In 1891 the Government sold to the 2nd defendant about 2,600 acres of the land which had been so set apart for free grazing. Thereupon the plaintiff on behalf of himself and his co-villagers sued the Secretary of State and the 2nd defendant, alleging that the portion of the free grazing lands

(1) I. L. R., 14 Bom., 220, 221. See also *Trimbak Gopal v. Secretary of State for India*, I. L. R., 21 Bom., 684, at p. 693.

(2) I. L. R., 14 Bom., 221.

(3) *Trimbak Gopal v. Secretary of State for India*, I. L. R., 21 Bom., 684,

left after the said sale was insufficient for the pasturage of the village cattle, and praying for an injunction ordering Government to set apart so much land as might be necessary for free grazing, and for a declaration that until this was done by Government the villagers were entitled to use as theretofore the entirety of the land which had been set apart for free pasturage at the survey settlement. The Court held that this was "a claim against Government respecting the occupation of waste . . . land belonging to Government," and therefore one which the Civil Courts were by Sec. 4 of the Bombay Revenue Jurisdiction Act, 1876, precluded from entertaining. In *Latchmeeput Singh v. Sadaulla Nushyo*⁽¹⁾, the English rule was followed and applied by the Calcutta High Court. Such a claim of right based on custom is of course quite a different matter; see note to Sec. 18. It is not clear from the report of *Fatchyab Khan v. Muhammad Yusuf*,⁽²⁾ whether the right of way which the residents of a certain *mahalla* or quarter of a town were, in that case, held entitled to as an easement, for the beneficial enjoyment of their dwellings, was regarded as having been acquired by virtue of a custom or by prescription.

Easements not
acquirable by
prescription if
claim unrea-
sonable.

A claim to a prescriptive right to take soil from certain land to an unlimited extent is untenable and bad in law, as being uncertain and unreasonable. Thus, in *Clayton v. Corby*⁽³⁾ a claim by prescription to dig and take clay from the plaintiff's land for the defendant's brick-kiln was held to be bad, on the ground that it was vague and uncertain as to its extent, and amounted to an indefinite claim to take all the clay from the plaintiff's close "or in other words to take the whole close" So, in *Attorney-General v. Mathias*,⁽⁴⁾ a claim to a right by prescription to grant licenses for working stone quarries in certain land was held unsustainable for uncertainty and unreasonableness. BYLES, J., said: "The present is a claim, not only to carry away the soil of another,

(1) I. L. R., 9 Cal. 698, 703.

(2) I. L. R., 9 All. 434.

(3) 5 Q. B. 415.

(4) 4 K. & J, 579. See also *Benson v. Chester*, 8 T. R. 396.

but to carry it away without stint or limit ; it is a claim which tends to the destruction of the inheritance, and which excludes the owner. A prescription, to be good, must be both reasonable and certain, (1) and this alleged prescription seems to be neither." (2) See also Sec. 17, sub-sec. (a).

An easement cannot be acquired, either by grant or by prescription, in derogation of a public right. In *Reg. v. Chorley*, (3) Lord DENMAN, C.J., said, speaking of a claim to a private right of way over ground over which there is a pre-existing public right of way, "it is obvious that no private right could have been acquired which was in derogation of it" (i.e. the public right) "except in some mode not pretended in the case before us" (the exception, apparently, being where such a right may have been created by a Statute). In *Rochdale Canal Co. v. Radcliffe*, (4) a right to take water for the use of a private mill from a canal which was made, under the provisions of an Act of Parliament, for the purpose of navigation by the public, was held to be not acquirable ; but the ground on which the case was argued and decided was that the acquisition of the easement claimed was inconsistent with the provisions of the Act.

Easements cannot be acquired in derogation of existing public right.

An easement cannot be acquired by twenty years prescriptive user, or by grant, either express, or inferred from twenty years uninterrupted user as of right, if the existence of such a right would be contrary to provisions, expressed or implied, of an Act of the Legislature. Thus where a canal had been made by a company under powers conferred by an Act of Parliament, which provided that subject to the rights of user of certain riparian landholders for limited purposes specified in the Act, the canal water was to be for the benefit of the public for purposes of navigation, an easement of user of water of the canal for purposes different from those specified in the Act, claimed by one of those landholders, was held not to have been acquired by twenty years uninterrupted adverse

Easement cannot be acquired if contrary to statutory enactment.

(1) Com. Dig.: "Prescription."

(2) 4 K. & J. 591,

(3) 12 Q. B. 517.

(4) L. R., 18 Q. B. D. 287.

user, because as an actual grant of such an easement by the company would have been *ultra vires* under the Statute and void, so it was impossible to presume a grant, by a person capable of making a valid one, from the twenty years user.⁽¹⁾

A corporation can prescribe for an easement.⁽²⁾

Exclusion in
favour of re-
versioner of
servient heri-
tago.

16. Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C had a life-interest in the land; that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Commentary.

The corresponding section of the English Prescription Act of 1832, viz. Sec. 8, only applies to easements of way and of

(1) *Rochdale Canal Company v. Radcliffe*, 18 Q. B. 287. See also *Proprietors of Staff. & Worc. Canal Navig. v. Proprietors of Birmingham Canal Navig.*, L. R., 1 E. & I. App. Ca. 254.

(2) *Hardy v. Halliday*, 2 R. R. 514; *Mellor v. Spateman*, 1 Saund. 339, 343; *Simpson v. Godmanchester Corporation*, L. R., 1896, 1 Ch. 214; *Goodman v. Corporation of Saltash*, L. R., 7 A. C. 633.

water, and in *Frewen v. Phillips*,⁽¹⁾ it was held that an easement of light could be acquired under that Act by uninterrupted user for twenty years during which time the servient tenement was in the occupation of a lessee for a term of years, notwithstanding that, as was said in the judgment, "the reversioner may have no means of preventing a right thereto" (to the light) "from being acquired by a twenty years' enjoyment, unless he can prevail upon his tenant to raise an obstruction, or is able to procure from the other party an acknowledgment that the light is enjoyed only by consent." The corresponding section of Act IX of 1871, *viz.* Sec. 28, though similar to this section of the Easements Act and to Sec. 27 of Act XV of 1877 in other respects, differs from them in this that it excepts easements of light and air,⁽²⁾ and therefore, in cases of claims to an easement of light or of air founded on user for twenty years while the servient tenement was in the occupation of a lessee for years or a life-tenant, and governed by Act IX of 1871, the decision in *Frewen v. Phillips* would be applicable, unless the Indian Court dissented from it; and unless the claimant were a lessee under the same lessor under whom the lessee of the servient tenement held, for in that case, as Act IX of 1871 (unlike the English Prescription Act, and the Easements Act) required the user of light and air to be "as of right," the claim might be defeated on another ground, *viz.* that the user was not as of right.⁽³⁾

Although in the computation of the twenty years, the period or periods of tenure of the burdened tenement by one or more life-tenants or lessees is to be omitted, the enjoyment of the benefit by the claimant of the easement must be continued during the period or periods of such tenure. "It

(1) 11 C. B., N. S., 449. See also *Mitchell v. Cantrill*, L. R., 37 Ch. D. 56; *Simper v. Foley*, 2 John. & Hem. 555, 564. *Secus* in *Bright v. Walker*, 1 C. M. & R. 211, 220, in which the easement claimed, being a right of way, did come within that enactment.

(2) See Appendices III and IV.

(3) See *Frewen v. Phillips*, 11 C. B., N. S., 449, 450; *Bright v. Walker*, 1 C. M. & R. 211, 219; and notes to ss. 12 and 15 (above, pages 70, 102 *et seq.*).

would be no answer," said the Court in *Onley v. Gardiner*,⁽¹⁾ "to say, that in one particular case, where the land over which the right is exercised is out on lease, the legislature had provided for the non-continuity, if I may so say, of one of the periods mentioned in the Act; but in truth it has not so provided, for the effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned." See also note to Sec. 15, (above, page 92 *et seq.*).

In *Arzan v. Rakhal Chunder Roy Choudhry*,⁽²⁾ the plaintiff was held to have acquired an easement by prescription under Act XV of 1877 against a mukarrari sub-lessee of the servient tenement; though the reversioners, the sub-lessor, and the original lessor, were not parties to the suit. But, with reference to this, see the note on Sec. 15 at p. 121.

It may be observed that the use of the word 'easement' in this section is open to criticism, inasmuch as no *right*—no *easement*—is, in the cases referred to in the section, acquired unless and until three years from the end of the life interest or term of years has elapsed without the reversioner resisting the claim. The wording of Sec. 8 of the English Prescription Act⁽³⁾ is not open to this criticism.

Rights which cannot be acquired by prescription.

17. Easements acquired under section fifteen are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired :—

(a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed ;

(1) 4 M. & W. 500.

(2) I. L. R., 10 Cal. 214.

(3) See Appendix V.

(b) a right to the free passage of light or air to an open space of ground ;

(c) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise ;

(d) a right to underground water not passing in a defined channel.

Commentary.

See note to Sec. 15 (pages 148, 149).

Paragraph (a).

By Sec. 15 the acquisition of an easement of light, or air, by prescription is limited to buildings, so that, strictly speaking, this provision in Sec. 17, paragraph (b), is superfluous.

Paragraph (b).
Light and air.

A prescriptive right to light, or to air, or to both, for a building, can only be acquired for passage of light or air through windows or other openings in the building specially intended for the reception of light or air. In *Bryant v. Lefever* (1) *BRAMWELL & BRETT, L. JJ.*, in their joint judgment, said, in reference to the easement of light: "The right in that case is always limited to the particular window or aperture through which the light and air have had access." Even before the Prescription Act (2 & 3 Will. IV, c. 71) came into force, which provides for the prescriptive acquisition of rights to light and air for buildings only, it was decided, in England, that an easement of light or of air for an open space of ground could not be acquired by prescription. (2) Sec. 28 of this (the Easements) Act seems to imply that, under this Act, an easement of light or of air, not only when acquired by prescription, but when created by grant, can only be for a passage of light or air to windows, doors or other openings in a building, for in its provision as to what is the extent of easements of light or air, when acquired by grant

(1) *L. R.*, 4 C. P. D., p. 178.

(2) *Roberts v. Macord*, 1 Mood. & Rob. 230; *Potts v. Smith*, *L. R.*, 6 Eq. 311.

as well as when acquired by prescription, (in the absence of evidence as to the probable intention and purpose,) it is only rights to the passage of light or air to a "window, door or other opening" that the section mentions.

Air.

A right, in respect of a windmill, to the free and uninterrupted passage of the currents of wind and air over a neighbour's lands to the mill, cannot be acquired by prescription. This was decided in *Webb v. Bird*.⁽¹⁾ That case was decided partly on the ground that the claim did not come within the Prescription Act, but also on the ground that such a right as this could not be acquired by prescription at all. WILLES, J., in his judgment in that case said :⁽²⁾ "That which is claimed here amounts to neither more nor less than this,—that a person having a piece of ground, and building a windmill upon it, acquires by twenty years' enjoyment a right to prevent the proprietors of all the surrounding land from building upon it, if by so doing the free access of the wind from any quarter should be impeded or obstructed. It is impossible to see how the adjoining owners could prevent the acquisition of such a right, except by combining together to build a circular wall round the mill within twenty years. It would be absurd to hold that men's rights are to be made dependent on anything so inconvenient and impracticable." And BYLES, J., said⁽³⁾ : "If such a right exists as to a mill, it must equally exist as to weather-cocks." And in the judgment of the Exchequer Chamber, confirming the judgment of the Court of Common Pleas, it was said : "In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interruption of the exercise of what is called a right by the person against whom it

(1) 10 C. B., N. S., 268.

(2) 10 C. B., N. S., 284.

(3) 10 C. B., N. S., 286.

is claimed, as a non-interruption by one who might prevent or interrupt it.”⁽¹⁾ In *Bryant v. Lefever*⁽²⁾ the plaintiff alleged that there had been for more than twenty years free access and escape of air and wind to and from the chimneys of his house, and that he had thus acquired a prescriptive right that this state of things should continue; that the defendants had interfered with it by raising the walls of their house, and by placing stacks of timber on the roof of their house; that further the defendants had thereby committed a nuisance by preventing the escape of the smoke and causing it to come into the rooms of the plaintiff's house. The plaintiff's allegations of fact were proved to the satisfaction of the jury, and the judge held the plaintiff to be entitled to the easement claimed, and the jury having assessed the damages at £40, judgment was entered for the plaintiff accordingly. The Court of Appeal reversed this judgment, holding that such a right as that claimed by the plaintiff could not be acquired, at all events by prescription. *BRAMWELL & BERR, L. JJ.*, in their common judgment, said:⁽³⁾ “Here the claim is of such a character that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land. The principle of *Chasemore v. Richards*⁽⁴⁾ is applicable, namely that the right claimed is not one the law allows, being too vague and uncertain; one the acquisition of which the adjoining owner could not defend himself against; and that the remedy of the plaintiff in such a case as this is to build higher, as in such a case as that it was to dig deeper. We are of opinion that on principle the plaintiff fails to make out his right as claimed; the authorities are to that effect. *Webb v. Bird*⁽⁵⁾ is really in point. . . . The reasoning in that case would be equally applicable to a claim by prescription from time whereof the memory of man runneth not to the contrary, if the date of the building of the plaintiff's

(1) 13 C. B., N. S. 843.

(2) L. R., 4 C. P. D. 172.

(3) L. R., 4 C. P. D., p. 178.

(4) 7 H. L. C., 349, at p. 386.

(5) 10 C. B. (N. S.) 268;
13 C. B. (N. S.) 841.

house could not be shewn. It is really hardly necessary to notice the other cases, which are sufficiently dealt with by the judges in *Webb v. Bird*,⁽¹⁾ We may, however, mention *Roberts v. Macord*,⁽²⁾ where PATTERSON, J., was of opinion that a claim like the present could not be supported. All the reasoning and all the considerations that prevailed in *Chesmore v. Richards*⁽³⁾ are opposed to it. Where it has been said that there is a right to air, there is good ground for supposing that the wholesomeness of the air had been interfered with, or that there was some peculiarity in the land or building which made the air necessary in a definite place."

As to whether such a right to air as that which was claimed in that case (*Bryant v. Lefever*) could exist by grant or covenant, BRAMWELL & BRETT, L. JJ., said: "We do not say there might not be an express grant or covenant not to interfere with the passage of air over neighbouring property, which could be enforced against the grantor or covenantor, and even against his assigns with notice; whether it could against assigns without notice it is not necessary to say."⁽⁴⁾ And it has been held that there may be an implied grant of, or covenant not to interfere with, the passage of a general and undefined current of air from A's to B's premises, arising from the fact that a tenement has been granted by A to B for being used for some purpose for which such passage of air is under ordinary circumstances necessary.⁽⁵⁾ See note to Sec. 8 (p. 54).

A right to unobstructed access of the South breeze, or any other wind, as such, was held not to be acquirable by prescription, though it might be acquired by express grant, by the law of India as it stood before Act IX of 1871⁽⁶⁾; or under that Act, or Act XV of 1877.⁽⁷⁾

(1) 10 C. B. (N. S.) 268; 13 C. B. (N. S.) 841. (3) 7 H. L. C., p. 349.

(2) 1 Mood. & R. 230.

(4) L. R., 4 C. P. D., p. 177.

(5) *Aldin v. Latimer Clark, Muirhead & Co.*, L. R., 1894, 2 Ch. 437. See also *Chastey v. Ackland*, L. R., 1895, 2 Ch. 389.

(6) *Bagram v. Khettranath Karformah*, 3 Beng. L. R., O. C. 45; *Barrow v. Archer*, 2 Hyde, 125, 129.

(7) *Delhi & London Bank, Ltd. v. Hem Lal Dutt*, I. L. R., 14 Cal. 839, 854.

In *Harris v. De Pinna*⁽¹⁾ the plaintiff claimed, under Sec. 2 of the Prescription Act, a right of access to openings in his building, which was used for storage and seasoning of timber, of air passing over the whole of the defendant's adjoining land. It was held that the right claimed being to air not as coming in a defined channel over a neighbour's land, but, generally and indefinitely, passing over that land, could not be acquired under that enactment. The Court followed *Webb v. Bird*,⁽²⁾ and COTTON, L. J., in support of his judgment,⁽³⁾ cited the following passage from the judgment of Lord BLACKBURN in *Angus v. Dalton*⁽⁴⁾: "I think this decision, that a right of prospect is not acquired by prescription, shews that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burden upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burden on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb v. Bird* and *Chasemore v. Richards* are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined and very extensive." And Lord Justice COTTON added: "As regards light that is an entirely different matter from air. Light, the principal light which we enjoy, comes to us in a direct line, in direct pencils, and the light which is thrown over a neighbour's land goes over a very short space indeed."⁽⁵⁾ And BOWEN, L. J., said: "The passage of undefined air gives rise to no rights and can give rise to no rights for the best of reasons, the reason of common sense, because you cannot acquire any rights against others by a user which they cannot interrupt."⁽⁶⁾ So, in *Thastey v. Ackland*,⁽⁷⁾ the claim of the plain-

(1) L. R., 33 Ch. D. 238.

(4) L. R., 6 App. Ca. 821.

(2) 10 C. B., (N. S.) 268;
13 C. B., (N. S.) 841.

(5) L. R., 33 Ch. D. 259.

(6) L. R., 33 Ch. D. 262.

(3) L. R., 33 Ch. D. 259.

(7) L. R., 1895, 2 Ch. 389 (decision of the Court of Appeal).

tiff, who was the owner of a house in a terrace with a yard at the back of it, to have the general current of air passing over the adjoining backyard of the defendant—the owner of the next house in the terrace to that of the plaintiff on one side—to the plaintiff's yard uninterrupted by buildings erected by the defendant in his yard, was held to be one which could not be acquired by prescription or by a presumed lost grant, not being a claim to a defined passage of air.⁽¹⁾ But where the claim is to access of air through a defined and limited space, as where the cellar of the plaintiff's house was ventilated by a shaft cut therefrom through the rock into a disused well situated in the defendant's adjoining land,⁽²⁾ a right to air may be acquired by prescription. To what extent the principles laid down in these decisions may be held by the Courts in India to be applicable to claims to easements of air made under Sec. 15 of this Act, which (unlike the English Prescription Act) puts them on the same footing as prescriptive claims to rights of light, and does not require the enjoyment to be as of right, remains to be seen.

See also note to Sec. 33, *Explanation III*.

Paragraph (c). Paragraph (c).—See *Perumal v. Ramasami*:⁽³⁾ *Robinson v. Ayya Krishnama Chariyar*.⁽⁴⁾

(1) But the complaint of the plaintiff was, that in consequence of the stagnation of air in and over his backyard caused by the current of air, which had flowed over it, being intercepted by the defendant's new building, certain foul exhalations proceeding from the conveniences at the back of the houses and from an urinal situate close to the plaintiff's backyard on the adjoining premises belonging to a third person at the back of that yard, were prevented from passing away as they did before such interference with the free passage of air, and hence the ventilation of the plaintiff's house through the back windows was rendered less pure and the air in the rooms of the house stuffy and unwholesome, and it was found as a fact that this was so; and on an appeal to the House of Lords, "during the argument several of their Lordships expressed dissent from the reasoning and decision of the Court of Appeal," and "in the course of the reply of the appellant's counsel Lord HALSBURY, L. C., observed that their Lordships might perhaps grant a mandatory injunction," and thereupon the parties compromised the case: L. R., 1897, A. C. 155.

(2) *Bass v. Gregory*, L. R., 25 Q. B. D. 481. See also *Hall v. Lichfield Brewery Co.*, 49 L. J. (Ch.) 655.

(3) I. L. R., 11 Mad. 16, 22.

(4) 7 Mad. H. C. R., 37, 46.

Paragraph(d).—If, therefore, a well, or a stream, in A's Paragraph (d). land depends, wholly or partly, for its supply, upon water coming to it from B's land, by percolation through the soil, A not only has no natural right to the water so coming to his well or stream,⁽¹⁾ but he cannot acquire such a right by user for any length of time,⁽²⁾ so as to give him a right of action against B if B by draining his land or digging a well or carrying out other operations in his land stops such passage of water into A's land. In *Chasemore v. Richards*, Lord WENSLEYDALE in his judgment said⁽³⁾: "I do not think that the principle on which prescription rests can be applied; it has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years or upwards. *Qui non prohibet quod prohibere potest, assentire videtur*; but how here could he prevent it? He could not bring an action against the adjoining proprietor; he could not be bound to dig a deep trench in his own land to cut off the supplies of water, in order to indicate his dissent. It is going very far to say that a man must be at the expense of putting up a screen to window lights, to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that." But an easement consisting of a right to underground water not passing in a defined channel can be acquired by grant, express or implied.⁽⁴⁾ Water percolating through soil cannot be described as a "stream".⁽⁵⁾ In *M'Nab v. Robertson*⁽⁶⁾ Lord WATSON in his judgment said: "I see no reason to doubt that a subterraneous flow of water may in some circumstances possess the very same characteristics as a body of water running on the surface; but, in my opinion, water, whether falling from the sky or escaping

(1) *Acton v. Blundell*, 12 M. & W. 324.

(2) *Chasemore v. Richards*, 7 H. L. C. 349.

(3) 7 H. L. C. 385.

(4) *Whitehead v. Parks*, 2 H. & N. 870; *M'Nab v. Robertson*, L. R., 1897, A. C. 129, 136, 138, 142. And see s. 7 and *Illustration (g)* thereto.

(5) *M'Nab v. Robertson*, L. R., 1897, A. C. 129; *Taylor v. Corporation of St. Helens*, L. R., 6 Ch. D., at p. 273 (*per* JESSEL, M. R.)

(6) L. R., 1897, A. C. 129.

from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream."⁽¹⁾

Other rights not acquirable by prescription, not mentioned in this section.

By building a house on his land so close to his neighbour's wall, that though the house does not touch nor is in any way supported by the wall, the wall shelters the house on one side, and practically serves as a side wall to the house, for which reason he builds no side wall to his house on that side, a man cannot, by however long user of such benefit derived from the neighbour's wall, acquire an easement over the wall.⁽²⁾

Right of way in any direction.

A right of way, over land, in every direction cannot be acquired by prescription. In order so to acquire a right of way, the passage over the land must be in a definite line, or in a particular direction.⁽³⁾ Compare the rule against variation of the line of passage, in the case of an existing right of way, in the *Exception* to the general rule in Sec. 23.

Customary easements.

18. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustrations.

(a) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as sub-

(1) L. R., 1897, A. O. 134.

(2) *Gordhan Dalpatram v. Chotalal Hargovan*, I. L. R., 13 Bom. 79.

(3) *Doorga Churn Dhur v. Kally Coomar Sen*, I. L. R., 7 Cal. 145; *Radhanath Sugrachari v. Baidonath Seal Kabiraj*, 3 Beng. L. R., Appx. 118.

stantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.

Commentary.

To some extent the evidence required to prove a customary easement is similar to the evidence required to prove a prescriptive easement. In both cases there must be evidence of user. But evidence of enjoyment for the benefit of one tenement, though it might prove a prescriptive easement in favor of that tenement, could not of itself establish a customary easement in favor of that and other tenements, *e.g.*, in favor of all the tenements of a particular town or village in which that tenement was situate. And, conversely, evidence showing enjoyment of the privilege by the owners, or occupiers, of all the tenements alike, *i.e.* evidence of the customary right, is not evidence of a prescriptive right in the owner or occupier of any particular one of those tenements.⁽¹⁾

In *Blewett v. Tregonning*,⁽¹⁾ the Court, as was stated in the judgment, left undecided the question whether both a title by prescription and a title by custom to the same easement in respect of the same tenement can co-exist.

There is a good deal of confusion, in Reports and text-books, between prescription and custom, in reference to easements, and the terms are sometimes used, erroneously, as if they were synonymous.⁽²⁾

In *Viresa and others v. Tatayya and others*,⁽³⁾ plaintiffs, inhabitants of a village on the banks of a tidal stream, claimed an exclusive *customary* right of fishing in the neighbourhood of their village by placing stake-nets across the stream

(1) *Blewett v. Tregonning*, 3 A. & E. 554, 588.

(2) *E.g.*, see Hall on the Sea Shore, pp. 205, 206, 209, and *passim*; *Aldred's case*, 9 Coke, 58.

(3) 1 L. R., 8 Mad. 467.

and intercepting fish passing down-stream from a certain lake from which the stream issued. They appear to have also based their claim upon immemorial prescription. The High Court, after laying down that an exclusive right of fishery, such as that claimed by the plaintiffs in tidal waters in India in derogation of the rights of fishery of the public, could be acquired by grant from the Crown, or by a period of enjoyment which would suffice for the acquisition of an easement against the Crown (sixty years),⁽¹⁾ and reversing the decision of the District Court on this point, proceeded thus: "But assuming that the plaintiffs had not established a right to a common of fishery as they claimed, they may have established a right to a fishery of such a nature that they are entitled *by custom* to prevent the exercise of a similar right by any other persons within a distance which would necessarily injure the exercise of the right by the plaintiffs;"⁽²⁾ and as the District Court had pronounced no judgment on the facts, the case was remanded for trial of the questions whether the plaintiffs were entitled by prescription or by custom to the right claimed by them. The common of fishery claimed in this case was apparently a common appurtenant, and therefore an easement within the meaning of the Indian Easements Act, for it was claimed by the inhabitants, *i.e.* the owners or occupiers of the lands, of the village and for their beneficial enjoyment as such owners or occupiers; see *Illustration (d)* of Sec. 4.

In the case of *The Zemindar of Kurapam v. The Zemindar of Merangi*,⁽³⁾ the plaintiff claimed an easement on the strength of a custom; and there was evidence of exercise of the right by the other villagers of Chitrapadu, in which plaintiff's land lay, as well as by plaintiff's father. But the decision of the High Court, holding the plaintiff's claim to be established, was based on the ground that he had made out a title to the easement by prescription.

(1) I. L. R., 8 Mad. 471.

(2) I. L. R., 8 Mad., p. 472.

(3) I. L. R., 5 Mad. 253.

A custom is not good in law so as to found a right in gross *in alieno solo*, and still less so as to found an easement, if it is claimed for persons generally and not for certain determinate persons. Thus in *Fitch v. Rawling*⁽¹⁾ a custom for all persons, for the time being, *being in the parish of A* to play at all kinds of lawful games, sports and pastimes in the plaintiff's close at all reasonable times of the year, at their free will and pleasure, was held to be bad; though a similar custom for all *the inhabitants of the said parish* was held good. BULLER, J., in his judgment in that case said: "Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom." In *Bourke v. Davis*⁽²⁾ KAY, J., in his judgment said: "He" (the defendant) "makes no claim for a right of recreation by custom. Such a claim is known to our law, but is carefully restricted. It cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district: *Fitch v. Rawling*⁽¹⁾; *Earl of Coventry v. Willes*⁽³⁾." With reference to the use of the word "district," KIRKWICH, J., in his judgment in *Edwards v. Jenkins*⁽⁴⁾ said: "I take it that the judges have used the word 'district' as meaning some division of the county defined by and known to the law as a parish is; and that I should be extending their meaning if I were to say that a custom of this kind could be claimed as regards several parishes." Accordingly in that case it was held that a custom for the inhabitants of several adjoining or contiguous parishes to exercise the right of recreation over land situate in one of such parishes was bad. A claim to a customary right must be made in favour of a class or determinate body of persons, otherwise it is lacking in that certainty or definiteness which is essential to its validity. Thus, where in support of a claim set up by the defendants

A right *in alieno solo* by custom in favour of persons in general cannot exist.

(1) 3 R. R. 425; 2 H. Bl. 393. See also *Hall v. Nottingham*, L. R. 1 Ex. D. 1.

(2) L. R., 44 Ch. D. 120.

(3) 9 L. T. (N. S.) 384.

(4) L. R., 1896, 1 Ch. 308, 313.

to a customary right to lay *tazias* upon the plaintiff's land during the Mohurram, all that was proved was that various *mirasis* had within a period of about twenty years before the suit placed *tazias* upon the land and sung there during the Mohurram, but it was not proved that there was any connection between such *mirasis*, or that they represented the body of *mirasis* of the locality (Bareilly) or even of the particular mohalla or part of that locality in which the plaintiff's land was situate, it was held that the claim failed on the ground (among other things) of its uncertainty as to extent and application.⁽¹⁾

Also, the user must not have been by leave granted from time to time, but as of right, and it must have continued for such a length of time as to show that it has become accepted as having the force of a local law; in short, all the conditions required for the establishment of a valid custom in other cases must be fulfilled in the case of customary easements.⁽¹⁾

Custom void
as being un-
reasonable.

The customary easement claimed if so extensive as to entirely deprive the servient owner of all profit arising from the servient tenement, will be void for unreasonableness, as was held in a case⁽²⁾ where the inhabitants of certain villages claimed under Sec. 26 of Act XV of 1877 an easement of fishery in the plaintiff's bhils. "According to the custom set up," said the Court, "there is no limitation to the number of persons entitled to enjoy it. The tenantry may increase to any number, so that, according to this custom, an unlimited number of persons can take away the profits of a private property, and that nothing may be left to the owner. . . . Such a custom as this does not seem to be reasonable. We are therefore of opinion that it ought to be rejected as invalid." But such objection on the ground of unreasonableness could not, it was held, be taken to a claim of inhabitants of a village in the Bombay Presidency to a right of grazing on Government land.⁽³⁾ The question

(1) *Kuar Sen v. Mamman*, I.L.R., 17 All. 87.

(2) *Lutchmeeput Singh v. Sadaulla Nushyo*, I. L. R., 9 Cal. 698, 703.

(3) *Secretary of State v. Mathurabhai*, I.L.R., 14 Bom. 212, 221.

whether a customary easement claimed is reasonable or not with reference to the extent or mode of user involved in it depends on the circumstances of the case. In *Orr v. Raman Chetti*⁽¹⁾ the customary right claimed by the defendants to erect a sand dam across a natural stream, when the stream was low, which had the effect of diverting the water into an irrigation channel supplying their land, which did not abut on the stream, and preventing water, except such as oozed through the dam, from flowing to the lands of the plaintiffs, who were lower riparian proprietors, was held upon the evidence in the case to be reasonable.

A claim to an easement or a profit *à prendre* based on custom is also, like any other claim of right on such basis, unsustainable if the custom is indefinite and uncertain. Thus, in *Wilson v. Willes*,⁽²⁾ a claim by the tenants, under the lord of a manor, of certain tenements which included gardens, to a customary right to dig and carry away turf from the waste lands of the manor, for making and repairing grass plots in such gardens every year, at all times in the year, in such quantity as occasion hath required, was held to be bad on the ground of its indefiniteness and uncertainty.

In *Mohanlal Jechand v. Ambatlal Bechardas*,⁽³⁾ the plaintiff set up a custom, entitling him to cut off the *pankh* or eaves of defendant's roof, which projected over a part of a space, belonging to the plaintiff, intervening between his and the defendant's houses, notwithstanding that the defendant had, according to the Limitation Act, acquired a prescriptive right, either by way of property or by way of easement, to retain the *pankh* in that position. It was held that such a custom if it existed, was superseded and made legally ineffectual by the Limitation Act. The custom which had existed in the cities of London and York whereby an owner of a site within either of those cities was entitled to erect a building though he thereby obstructed the ancient lights of

Custom impliedly annulled by enactment.

(1) I.L.R., 18 Mad. 320.

(2) 7 East, 121.

(3) I.L.R., 3 Bom. 174.

his neighbour's building⁽¹⁾ was by the Prescription Act, Sec. 3, expressly annulled and rendered ineffectual as against the acquisition of rights to light under that section.⁽²⁾ The Bombay case just now cited is authority, if authority were needed, to show that though there is in the Easements Act no express annulment of customs (if any) inconsistent with Sec. 15⁽³⁾ thereof, that section overrides such customs (if any).

Right of privacy.

In *Gokal Prasad v. Radho*⁽⁴⁾, EDGE, C. J., after a very comprehensive examination of decisions (including some unreported decisions) of the High Court and Sadr. Court of the N.-W. P., and the High Courts of Calcutta, Bombay and Madras, came to the conclusion that a right of privacy exists by usage or custom in the N.-W. P., among those Hindus and Mahomedans who observe the custom of the *pūrda*, i.e. among all Hindus except those of the lowest castes and all Mahomedans except the lowest. In a subsequent Allahabad case it was held that the customary right to privacy which exists in the N.-W. Provinces is not limited to Hindus and Mahomedans, but extends in favour of others, the religion of the person claiming the right being immaterial.⁽⁵⁾ The existence of such a custom of privacy in Gujarāt has been affirmed by decisions of the Bombay High Court⁽⁶⁾. The burden on the servient owner precludes as well the opening by him of any windows or other apertures in his building commanding a view of the private portions of the dominant tenement, as the building of any verandah, terrace-roof or other structure commanding such view. In *Gokal Prasad v. Radho*, EDGE, C. J., expressed the opinion that a person who erected a new

(1) See *Perry v. Eames*, L.R., 1891, 1 Ch. 658, 667; *Wyntanley v. Lee*, 2 Sw. 333.

(2) See Appendix V.

(3) Sec. 2, sub-sec. (b), only applies to rights in gross.

(4) I.L.R., 10 All. 358. See also *Lachman Prasad v. Jamna Prasad*, I.L.R., 10 All. 162.

(5) *Abdul Rahman v. Emile*, I.L.R., 16 All. 69.

(6) *Manishankar Hargovan v. Trikam Narsi*, 5 Bom. H. C. R. (A.O.) 42; *Kuvarji Premchand v. Bai Javer*, 6 Bom. H. C. R. (A. C.) 143; *Keshav Harkha v. Ganpat Hirachand*, 8 Bom. H. C. R. (A. C.) 87.

building in which *purda-nashin* ladies were to reside could not acquire a customary right of privacy in respect of such new building against the owner of an adjacent building site, unless the latter acquiesced in the erection of such building, as a custom giving such a right under such circumstances would, in the learned Judge's opinion, be an unreasonable custom, and therefore bad in law; but that "if the owner of such an adjacent building site were, without protest or notice, to allow his neighbour to erect, and consequently to incur expenses in erecting, buildings or premises for the use of *purda-nashin* women, a custom which would prevent him subsequently interfering with the privacy of such new building, would not be unreasonable in this country."⁽¹⁾ This was a decision rendered (in 1888) before the Easements Act was extended to the N. W. Provinces. It is evident from *Illustration (b)* to this section that the legislature, in this Act, recognizes the possible existence of a custom good in law whereby the builder of a new house would acquire a right of privacy precluding the owner of an adjacent house already built (and therefore, *a fortiori*, the owner of an adjacent site not yet built on) from opening new windows overlooking the zenana apartments of such new house, whether the adjacent owner allowed such new house to be erected without protest or notice, or not. Onerous as this servitude is in any case, it would, it is submitted, be onerous beyond measure and invalid for unreasonableness if it was claimable in respect of open spaces of ground outside a building, such as a garden or compound. It would appear from observations of EDGE, C. J., in *Gokal Prasad v. Radho*⁽²⁾, that in his opinion a right of privacy could be had in respect of the court-yard of a house. In *Keshav Harkha v. Ganpat Hirachand*⁽³⁾, where the customary right of privacy in Gujarât was claimed to have been infringed by the defendant opening a window overlooking an open court-yard outside the plain-

(1) I.L.R., 10 All. 386, 387.

(2) I.L.R., 10 All. 386, 360.

(3) 8 Bom. H. C. R. (A. C.) 87.

tiff's house, the Court held that the claim was not within the limits of the customary right and dismissed the suit. Probably the court-yard referred to in the judgment of the Chief Justice in *Gokal Prasad v. Radho*, was the interior court-yard of a house (though it is not stated in the report that it was), and, having regard to the form of construction of houses of Hindus or Mahomedans having interior court-yards and the objects of such form of construction, it may be considered not unreasonable that such interior court-yards, if intended to be used not only for the admission of light and air to the apartments and verandahs but as a place where the women of the family can be in privacy, should be within the protection claimable on the ground of a custom of privacy.

Removal of
support.

The owner of a subjacent stratum of soil cannot acquire by custom an easement entitling him, by mining or otherwise, to deprive the superincumbent surface soil of another owner of its support, (whether the latter be only entitled to the natural right of support, or be also entitled to an easement of support to buildings,) thereby destroying or seriously damaging the superincumbent property; for such a custom would be unreasonable and therefore void.⁽¹⁾

*Profit à
prendre* not
acquirable by
custom by
English law.

By the English law, a *profit à prendre* cannot be acquired by custom.⁽²⁾ In *Atty-Genl. v. Mathias*,⁽³⁾ BYLES, J., said: "Now it is an elementary rule of law that a *profit à prendre* in another's soil cannot be claimed by custom, for this, among other reasons, that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons, like the inhabitants of a parish or other district, who could not release the right. The leading case on the subject is *Gateward's Case*, which has been repeatedly followed and never overruled."⁽⁴⁾ And in *Goodman v. Mayor of*

(1) *Blackett v. Bradley*, 1 B. & S. 940; *Hilton v. Earl Granville*, 5 Q. B. 701.

(2) *Gateward's case*, 6 Rep. 59; *Grimstead v. Marlowe*, 4 T. R. 717; 2 R. R. 512; *Haigh v. West*, L. R., 1893, 2 Q. B. at p. 23 (per CHARLES, J.)

(3) 4 K. & J. 579, 591.

(4) See also *Blewett v. Tregonning*, 3 Ad. & E. 554.

Saltash,⁽¹⁾ Lord CAIRNS said: "I think it to be clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a *profit à prendre in alieno solo*."

And in *Selby v. Robinson*,⁽²⁾ a claim of a right by custom for the poor and indigent house-holders residing in a certain town to a *profit à prendre* (*viz.* to cut and carry away the rotten wood of trees in the plaintiff's close) was held to be not maintainable.

Tenants under a Zamindar, who appear to have been permanent occupancy rayatwari tenants, entitled to the soil subject to payment of tirva, were held to be entitled to a customary easement to divert water from a river against their landlord.⁽³⁾

Tenant having customary easement against his landlord.

A custom, for which provision was made in the *wajib-ul-arz* of a village, in the N. W. P., of inhabitants of the village to graze their cattle on waste land in the village belonging to a Zamindar, was held to be permissive and not to have taken away from the Zamindar the right to reclaim such waste land.⁽⁴⁾

Those customary rights *in alieno solo* which are not easements but rights in gross, and are not dealt with in this Act,⁽⁵⁾ must of course be carefully distinguished from easements created by custom. Such a right in gross was the right claimed, and upheld by the Court, in *Ashraf Ali v. Jagan Nath*⁽⁶⁾ which was a customary right of certain Hindus, inhabitants of a *mohalla*, to celebrate a festival upon a piece of land belonging to a third party, and was not a right to do something for the beneficial enjoyment of land owned or occupied by them.

Customary rights in gross.

(1) L. R., 7 App. Ca. 648. See also *Smith v. Andrews*, L. R., 1891, 2 Ch. 678, 700.

(2) 2 T. R., 758; 1 R. R. 615.

(3) *Orr v. Raman Chetti*, I. L. R., 18 Mad. 320, 321, 327.

(4) *Ram Saran Singh v. Birju Singh*, I. L. R., 19 All. 172.

(5) See s. 2, sub-sec. (b).

(6) I. L. R., 6 All. 497.

Transfer of
dominant
heritage
passes ease-
ment.

19. Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Illustration.

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representative so long as the lease continues.

Commentary.

In the case of a transfer arising out of a contract between the parties, as in the cases of sales, leases or mortgages, it may, of course, be one of the terms of the contract that an easement annexed to the property the subject of the contract shall not be transferred with the property. The transferor may, *e.g.*, wish to release the easement (whether gratuitously or for consideration) in favour of the servient owner. Similarly in the case of a testamentary gift, or of a gift *inter vivos*, of property, to which an easement is annexed, the testator or donor may, if he chooses, give the property without the easement. But unless by the terms of the transfer, whether *inter vivos* or testamentary, such easement is expressly, or impliedly, excluded from the transfer, the transfer of the property itself carries with it any easement annexed to the property. This rule, so far as transfers *inter vivos* are concerned, with which alone the Transfer of Property Act deals, is enacted in sec. 8 of that Act. As enacted in this section of the Easements Act, it is more comprehensive, applying as it does to all transfers, testamentary as well as *inter vivos*, made by persons, and also to transfers by operation of law. The same rule exists in the English law. And

the Conveyancing and Law of Property Act, 1881⁽¹⁾, s. 6, provides that "a conveyance of land shall be deemed to include, and shall by virtue of this Act operate to convey, with the land, all . . . commons, . . . ways, waters, water-courses, liberties, privileges, easements, rights and advantages whatsoever appertaining . . . to the land or any part thereof . . ."; then follow other words which apply not to existing easements but to *quasi*-easements enjoyed by the transferor for the benefit of the property conveyed over other property belonging to him; and the section contains a similar provision as to a conveyance of land having houses or other buildings thereon, with the addition, in the general words to be implied in that case, of the words "sewers, gutters, drains, passages, lights." But is it provided by the same section,⁽²⁾ that "this section applies only if and as far as a contrary intention is not expressed in the conveyance." As to the question what general words a conveyance ought to contain, that of course depends upon the terms of the contract, wherever the conveyance proceeds from a contract. In reference to s. 6 of the Conveyancing and Law of Property Act, 1881, CHITTY, J., in his judgment in *In re contract between Peck and School Board for London*⁽³⁾ said: "The object of the 6th section, as is apparent from the language of the section itself, is to show what general words are to be taken as included in a conveyance of land where the conveyance is otherwise silent. It is with conveyance of land only that the Legislature is dealing, and not with the contract; and it is plain, to my mind, that neither party to a contract is entitled to have these general words included in the conveyance unless they are justified by the contract, and appropriate to the proved circumstances of the case." His Lordship was dealing in that case with the question whether a way which was not a right of way against a third person,

(1) 44 & 45 Vict., c. 41. See also Lands Clauses Act, 1845 (8 & 9, Vict. c. 18), s. 81, and Sched. A and B.

(2) Sub-sec. (4).

(3) L. R., 1893, 2 Ch. 315, 318.

but was a way *de facto* enjoyed by the vendor or his tenant for the benefit of the property sold over other adjoining land of the vendor retained, was by the terms of the contract of sale included in what was intended to be sold and whether therefore the words in the section "reputed to appertain to or enjoyed with" ought to be inserted in the conveyance⁽¹⁾ (as they would be by implication, by reason of that section, unless expressly excluded); but it is obvious that the principle of the decision would apply to a case where by the terms of the contract an easement existing for the benefit of the property contracted to be conveyed was excluded from what was intended to be conveyed: in such a case the operation of s. 6 of the Conveyancing and Law of Property Act, conveying by implication "all commons, ways," &c., "appertaining to the land," or that of s. 19 of this Act and s. 8 of the Transfer of Property Act (according as the case might be one governed by the former or by the latter law), would have to be excluded by a proviso to that effect inserted in the conveyance.⁽²⁾

The law enacted in this section and s. 8 of the Transfer of Property Act and s. 13 of this Act, combined, differs from that of s. 6 of the English Conveyancing and Law of Property Act in this, that under the former an instrument of conveyance containing no general words would, in the absence of any provision therein to the contrary, carry only existing easements and—as newly created easements—easements of necessity and such *quasi*-easements, enjoyed at the time of the transfer, over property of the transferor from which the property conveyed was severed, as were continuous and apparent, whereas under the latter such an instrument of conveyance would, in the absence of any provision therein to the contrary, besides carrying all that the former instrument would carry, pass also—by the words "or at the time of the conveyance . . . occupied or enjoyed with," &c., to be

(1) As to this see note to s. 8 (p. 57 and foll.).

(2) See the note of the Order made in *In re Peck and London School Board*, L. R., 1893, 2 Ch., at p. 322.

read into the conveyance by implication—as newly created easements—*quasi*-easements, enjoyed at the time of the transfer, over property of the transferor retained by him, which were not continuous nor apparent.⁽¹⁾

As to the effect of general words, in an instrument of transfer of property, for carrying easements already existing against third persons, or for creating *de. novo* easements against the alienor, or otherwise, see note to s. 8 (p. 57—65). As to the creation of easements of necessity, and as to the conversion of *quasi*-easements of a certain character into easements on a severance, by alienation or by partition, of the benefited from the burdened tenement, see s. 13 and notes thereto.

CHAPTER III.

THE INCIDENTS OF EASEMENTS.

20. The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Rules controlled by contract or title.

And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

Incidents of customary easements.

Commentary.

“Imposing” an easement conveys the notion of creating a new easement, (or, rather, a new obligation correlative to an easement,) not the notion of declaring, or confirming, the existence of an easement already acquired. A decree may declare a party to be entitled, by some title independent of

(1) See *In re Peck and London School Board*, L. R., 1893, 2 Ch. 315.

the decree, to an easement, and it may declare, either directly, or impliedly by granting or withholding certain relief, incidents of an easement, but it is difficult to see how a decree could be said to "impose" an easement, except perhaps in the case of some partition decrees and of some consent decrees, and perhaps also in the case of suits in which claims to prescriptive easements are based on the statutory title,⁽¹⁾ in which case the easement is not acquired (nor therefore "imposed" on the servient owner) till suit brought and decree in favour of the claimant obtained. See note to Sec. 8, (pages 45,46).

Bar to use unconnected with enjoyment.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations.

(a) A, as owner of a farm Y, has a right of way over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

(b) A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

Commentary.

See note to sec. 4, (page 7).

In *Simpson v. Godmanchester Corporation*⁽²⁾, in which the respondents, the corporation, were held to have acquired by

(1) See s. 15 of this Act, and the corresponding section in the Indian Limitation Acts, and the English Prescription Act. See Appendices III, IV, V.

(2) L. R., 1897, A. C. 696; 1896, 1 Ch. 214.

prescription the right to open the gates or sluices of certain locks, belonging to the appellant, upon a river, in times of flood or imminence of flood, in order to protect their lands from inundation, Lord WATSON in his judgment on the appeal before the House of Lords said: "If the appellant had been able to shew that the corporation had carried their operations beyond what was necessary to protect their own lands, so as to clear other lands of flood-water when their own were neither flooded nor threatened with inundation, the appellant would have been entitled to restrain the respondents from doing more than was reasonably necessary in order to protect their dominant lands. But he has made no such complaint; and there is no evidence in this case which could support it."⁽¹⁾

In that case (*Simpson v. Godmanchester Corporation*) it was contended on behalf of the appellant before the House of Lords that no easement can be acquired, or, if acquired, can continue, if the exercise of the benefit or easement in favour of the tenement which is claimed as, or is, (as the case may be,) the dominant tenement, has the effect of also benefiting another or other tenements, and that therefore the easement claimed by the corporation "could not be legally constituted in favour of the lands vested in the corporation as the dominant tenement, inasmuch as other lands than those of the corporation, to which no such easement was attached, were benefited by its exercise."⁽²⁾ But this contention was held to have no foundation either in principle or authority. Lord WATSON said: "The second point appeared to me to be equally devoid of substance. It was broadly and boldly maintained that no burden imposed upon a servient tenement, however beneficial to the dominant estate, can in law be regarded as an easement, if its exercise for the benefit of the dominant estate has the effect of conferring some benefit upon some other land which is not included in that estate and has no similar right of easement. In the case of many easements it

(1) L. R., 1897, A. C., at p. 702.

(2) L. R., 1897, A. C., at p. 701.

is from their nature possible to confine their benefit to the dominant tenement; but in cases where the easement relates to water, or to light and air, it would be simply impossible to do so. If the law were as contended for by the appellant, a servitude right to take water from the lands of A. for the use of the lands of B. could not be acquired either by grant or prescription, if, owing to the position and levels of the lands of B., it were necessary to discharge the water, or its surplus, into the lands of C., to the advantage of their owner or occupant. In like manner there could be no servitude of light and air in favour of the windows of a particular house, if the maintenance of the right happened to be of some advantage to the windows of an adjoining house which did not participate in the easement. But the proposition is as destitute of foundation in authority as it is, in my opinion, unreasonable. It is no doubt one of the essential characteristics of a legal easement that its exercise shall be for the use and benefit of the dominant estate. But there is no law to the effect that an easement, which is serviceable and beneficial to that estate, shall cease to exist whenever from the very nature of the right its exercise by the dominant estate confers, or tends to confer, some benefit upon other lands or tenements. The appellant's counsel, as might have been expected, cited no decision in support of their doctrine and no judicial opinion in which it was discussed."⁽¹⁾

Exercise of
easement.

Confinement
of exercise of
easement.

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

(1) L. R., 1897, A. C., at pp. 702, 703.

Illustrations.

(a) A has a right of way over B's field. A must enter the way at either end and not at any intermediate point.

(b) A has a right annexed to his house to cut thatching-grass in B's swamp. A, when exercising his easement, must cut the grass so that the plants may not be destroyed.

Commentary.

In connection with this section may be considered the case of excessive user, or abuse, of an easement by the dominant owner. This may affect, not only the owner of the servient tenement, but a third person who also has an easement over the same tenement. Thus where the plaintiffs as well as the defendants had, as owners of their respective houses and premises, a right to use a lane for the purpose of carrying the nightsoil from their respective premises to the public street, and the defendants had, in excess of their right, cleaned their privies into the lane instead of upon their own premises, an injunction was granted by WILSON, J., restraining the defendants from so doing.⁽¹⁾ On appeal the decree so far as it granted the injunction was reversed (upon what ground does not appear from the report), but the Appellate Bench agreed with the Court of first instance, as to the defendants' right of way over the lane for carrying away nightsoil from their premises being a right of using it (for that purpose) in such way as would least affect the plaintiffs in the enjoyment of their premises.⁽²⁾

23. Subject to the provisions of section twenty-two, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Right to alter mode of enjoyment.

(1) *Chunder Goomar Mookerji v. Koylash Chunder Sett*, I. L. R., 7 Cal. 665, 676.

(2) I. L. R., 8 Cal. 677, 678.

Exception.—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

Illustrations.

(a) A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.

(b) A has a right to discharge on B's land the rain-water from the eaves of A's house. This does not entitle A to advance his eaves, if, by so doing, he imposes a greater burden on B's land.

(c) A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.

(d) A, a riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.

Commentary.

Illustrations.

A person having an easement of light for his building may alter the use to which the building is applied and apply it to a use requiring more light, and may yet retain his right to so much light as he was entitled to before the alteration, but he cannot by making such alteration acquire a right to any additional light.⁽¹⁾ He may even pull down the building and erect on its site a building of an entirely different character (as where a warehouse was built on the site of a

(1) *Martin v. Goble*, 1 Camp. 320.

church), and yet retain his right to light, provided that the windows of the new building are in such a position as to receive the same cones of light, or a substantial portion of the same cones of light, which were enjoyed by the windows of the old building⁽¹⁾ Nor will moving back or moving forward the plane of the wall of the dominant building, in which the windows are, destroy the right. If the building is set back so far, or set forward so far, that the windows of the altered or new building do not enjoy the same cones of light, passing over the servient tenement, as were enjoyed by those of the old building, the right will be lost; otherwise, not.⁽²⁾ The English cases cited were decided upon the basis of the construction to be put on Sec. 3 of the Prescription Act, but the wording of that enactment is substantially the same as that of Sec. 15, first para., of this Act, and that of the corresponding enactments in the Limitation Acts of 1877 and 1871 except that by those Limitation Acts the enjoyment was required to be as of right. See Appendices III, IV, V. See also note to Sec. 43.

If a riparian proprietor who has acquired a prescriptive right to take water from a river at a particular place on Saturdays and Sundays, when it runs pure, and return it to the river in a polluted state, takes water throughout the week from the river at another place lower down the stream where pure water is discharged into it by a tributary stream, the burden lies on him to shew that the change has not the effect of increasing the pollution of the water flowing past the lands of the lower proprietors, and he has no right to make the alteration unless he is in a position to shew this.⁽³⁾

In *Great Western Railway Co. v. Oefn Cribbwr Brick Co.*⁽⁴⁾ a railway company, the predecessors in title of the plaintiffs, had been incorporated under a special Act of 1825 with

(1) *Newson v. Pender*, L. R., 27 Ch. D. 43; *Tapling v. Jones*, 11 H. L. C. 290.

(2) *Scott v. Pape*, L. R., 31 Ch. D. 551; *Ecclesiastical Commissioners v. Kino*, L. R., 14 Ch. D. 213; *Staight v. Burn*, L. R., 5 Ch. 163.

(3) *McIntyre Brothers v. McGavin*, L. R., 1898, A. C. 268.

(4) L. R., 1894, 2 Ch. 157.

power to buy land and make "a railway or tramroad passable for waggons and other carriages," and to erect stationary steam engines. The Act reserved to the owner of any land so purchased all subjacent mines and minerals with power to work them "but so as nevertheless not to prejudice or injure such railway." Under and in accordance with this Act land belonging to the predecessors in title of the defendants was bought and the railway or tramroad constructed by the said railway company was laid across it. Up to 1855 the railway or tramroad was only a horse tramway. In that year an Act was passed empowering another railway company to convert the horse tramroad into a broad gauge line of railway, suitable for locomotive engines, and the old railway was re-constructed accordingly as a broad gauge line, on which heavy locomotive engines, passenger carriages and trucks, of the modern type, were run. The Act of 1855 repealed the Act of 1825, but without prejudice to any thing done under it and to all rights and liabilities which, if the repealing Act were not passed, would be incident to or consequent on anything so done. The defendants worked their mines under the railway in 1892, and a subsidence of the superjacent soil and railway took place, and in 1893 the plaintiffs sued for an injunction. The defendants contended that the subsidence was due to the increased weight imposed upon the land by substantial alterations in the dominant tenement made under the Act of 1855, throwing an increased burden on the servient tenement, which had the effect of extinguishing the easement. But the Court found on the evidence "that there would have been, in any case, subsidence from the working of the minerals, which subsidence has been probably only a little accelerated, if at all, by the working of the railway, and that therefore it is the working of the minerals which has produced this injury;"⁽¹⁾ and held that the easement of support had not been lost by the alteration in the railway and traffic. The learned judge who decided the

(1) L. R., 1894, 2 Ch. 164.

case said in his judgment:(1) "they" (the predecessors in title of the defendants) "made their bargain, and I see no reason for saying that, because the land has since been used in a somewhat different way, therefore the right to support is gone. It is used in a similar character—it is a railway—and I think it would be straining the doctrine which has been laid down in some cases cited for the defendants as to the law of easements to say that, because a new science has introduced new methods of user, therefore the right to support is lost."

The grantee of a right of way through a slip of land from one end of the slip to the other, is not entitled to have a transverse way leading from the slip into land belonging to him adjoining the slip laterally.(2)

Exception.—See note to Sec. 17, (p. 160).

Exception.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Right to do acts to secure enjoyment.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

Accessory rights.

Illustrations.

(a) A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(1) KEKEWICH, J., L. R., 1894, 2 Ch. 167.

(2) *Senhouse v. Christian*, 1 T. R. 560; 1 R. R. 300.

(b) A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain, to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.

(c) A, as owner of a certain house, has a right of way over B's land. The way is out of repair, or a tree is blown down and falls across it. A may enter on B's land and repair the way or remove the tree from it.

(d) A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.

(e) A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.

(f) A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.

(g) A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away by an inundation. A may enter upon B's land and repair the dam.

Commentary.

Where a grant of certain land reserved to the grantor the coal mines therein "together with liberty of sinking and digging a pit or pits, for winning the coal" therein, it was held that the grantor was entitled to erect on the land so granted a steam engine, engine house and such other machinery and buildings as would be necessary for working the mines, and to make therein a pond which was required for supplying the engine.⁽¹⁾

Many easements cannot be enjoyed, or cannot be enjoyed beyond a certain time, unless something is done, such as the execution of repairs, in the servient tenement, and, inas-

(1) *Dand v. Kingscote*, 6 M. & W. 174; There may, of course, as there was in that case, be a stipulation for compensation being payable for the injury to the surface soil caused by the exercise of the easement and its accessory rights.

much as the servient owner is under no obligation to do anything for the dominant owner, the law allows the latter to commit what would otherwise be a trespass on the servient tenement, for the purpose of doing therein such acts as are necessary for enabling him to enjoy the easement.(1) And obstruction to the due exercise of such accessory rights, is actionable, like disturbance of the easement itself.(2) Thus, where the plaintiff, the owner of a house, had an easement entitling him to a supply of water conducted by pipes through adjoining land, and the defendant, who had purchased part of that land for building purposes, was proceeding to build a house thereon, which if built would materially interfere with, and increase the expense of, the plaintiff's obtaining access to the pipes for the purpose of repairing them, an injunction was granted to restrain the building of the house.(3)

As with the principal right (see Sec. 22), so with the accessory right, it must be exercised as little onerously to the servient owner as is possible consistently with a reasonable enjoyment of the easement. Where the plaintiff was entitled to an easement of having the roof of his house projecting over, and discharging the rain-water therefrom onto, the defendants' land, and therefore to enter on the defendants' land for the purpose of repairing the roof, the Court, while affirming this accessory right, directed that it should be exercised only once a year after one month's notice to defendants and between the hours of 9 A.M., and 5 P.M.(4)

The right of deviation continues so long as the obstruction to the way remains, and the dominant owner is not bound to take proceedings in Court for the removal of the obstruction. And if the servient owner obstructs the substituted passage over the adjoining land also, the dominant owner may obtain an injunction restraining him from ob-

Illustration(d).
Way.
Right of deviation.

(1) *Pomfret v. Ricroft*, 1 Saund. 320; *Colebeck v. Girdlers Co.*, L. R. 1 Q. B. D. 234, 243; *Liford's case*, 11 Rep. 52a.

(2) See sec. 33.

(3) *Goodhart v. Hyett*, L. R., 25 Ch. D. 182.

(4) *Hayagrave v. Sami*, I. L. R., 15 Mad. 286.

structing such substituted route until he removes the original obstruction which occasioned the deviation.⁽¹⁾

Illustration(e).
Way, right incidental to making.

Illustration(e).—The grantee of a free and convenient way for carts, waggons, wains, and other carriages, for carrying (amongst other things) coals, was held to be entitled to lay a framed waggon-way.⁽²⁾ So, the grantee of a right to a carriage-way can lay down stones and make a metalled road, suitable for the purpose, on the servient land.⁽³⁾ And a right of a dominant owner to make a waggon-way over land under which he has the right to work mines may include a right to make excavations in the adjoining soil for the purpose of raising embankments whereon to carry the waggon-way across hollows or valleys, and also to cut through eminences.⁽⁴⁾

A prescriptive right of the owner of land to have the branches of his trees overhanging his neighbour's adjoining land was held not to carry with it as an accessory the right to go upon such adjoining land for the purpose of picking the fruit of those trees, which was held to be perfectly distinct right from the former right: *Naik Parsotam Chela v. Gandrap Fatelal Gokuldas*.⁽⁵⁾ But such prescriptive right itself to have boughs of a tree overhanging one's neighbour's land cannot be acquired.⁽⁶⁾

Liability for expenses necessary for preservation of easement.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

Liability for damage from want of repair.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the

(1) *Selby v. Nettlefold*, L. R., 9 Ch. App. 111.

(2) *Senhouse v. Christian*, 1 T. R. 560; 1 R. R. 300.

(3) *Newcomen v. Coulson*, L. R., 5 Ch. D. 459.

(4) *Abson v. Fenton*, 1 B. & C. 195.

(5) 1 L. R., 17 Bom. 745.

(6) *Lemmon v. Webb*, L. R., 1894, 3 Ch. 1; 1895, A. C. 1; *Hari Krishna Joshi v. Shankar Vithal*, 1 L. R., 19 Bom. 420.

servient heritage arising from the want of repair of such work.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement : but he must not do any act tending to restrict the easement or to render its exercise less convenient.

Servient owner not bound to do anything.

Illustrations.

(a) A, as owner of a house, has a right to lead water and send sewage through B's land. B is not bound as servient owner to clear the watercourse or scour the sewer.

(b) A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed ; but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(c) A, in respect of his house, is entitled to an easement of support from B's wall. B is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(d) A, in respect of his mill, is entitled to a watercourse through B's land. B must not drive stakes so as to obstruct the watercourse.

(e) A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light.

Commentary.

"is not bound
to do," &c.
"he is en-
titled," &c.

See note to Sec. 4 (p. 8) and note to Sec. 5, (p. 20).

In accordance with the principle contained in this section it was held, where the defendant, over a channel in whose land the plaintiff had a right of passage for boats, had narrowed the channel, but the breadth of the channel when so reduced was still amply sufficient for the passage of the plaintiff's boats, that the plaintiff's right had not been infringed.⁽¹⁾

A right to have water discharged, from a roof, or from a water-drain or otherwise, on to, and carried off over, certain land of one's neighbour does not disentitle the latter to build on that land, provided he makes proper arrangements for receiving and carrying away the water.⁽²⁾ So, an easement of light only restricts the servient owner, in his rights of building on the servient land, so far as the access of light to which the dominant owner is entitled would be interfered with by building.⁽²⁾

A right in a person to take something from the land of another—a *profit à prendre*—does not preclude the servient owner from taking or using the same thing from his land, provided he does not interfere with the exercise by the dominant owner of his right. In *Duke of Sutherland v. Heathcote* ⁽³⁾ the Court of Appeal in their judgment said: "A *profit à prendre* is a right to take something off another person's land; such a right does not prevent the owner from taking the same sort of thing from off his own land; the first right may limit, but does not exclude, the second. An exclusive right to all the profit of a particular kind can, no doubt, be granted; but such a right cannot be inferred from language which is not clear and explicit. This is plain from the many cases referred to in the argument, viz.: *Lord Mountjoy's Case*⁽⁴⁾; *Chetham v. Williamson*⁽⁵⁾; *Doe v. Wood*⁽⁶⁾; and

(1) *Doorga Churn Dhur v. Kally Coomar Sen*, I. L. R., 7 Cal. 145.

(2) *Bala v. Maharaj*, I. L. R., 20 Bom. 788.

(3) L. R., 1892, 1 Ch. 475, 484.

(5) 4 East, 469.

(4) 1 And. 307; 4 Leon. 147.

(6) 2 B. & Al. 724.

Carr v. Benson(1).” In that case it was held that a reservation to a grantor, his heirs and assigns, in a deed of grant of land, of “full and free liberty . . . to search for, get, dig, drain and carry away the coal, ironstone and other minerals” within the land granted was not a mere license but a *profit à prendre*, but that it was not an exclusive right to work the minerals and did not exclude the right of the grantee of the land to work them provided he did not disturb the grantor in his working operations when and where he was carrying them on(2).

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:—

Extent of easements.

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Easement of necessity.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.

Other easements.

In the absence of evidence as to such intention and purpose—

(a) a right of way of any one kind does not include a right of way of any other kind :

Right of way.

(b) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that

Right to light or air acquired by grant.

(1) L. R., 3 Ch. 524.

(2) See also *Lord Mountjoy's case*, 4 Leon. 147; 1 And. 307; and the observations of LINDLEY, L.J. on that case and on *Chetham v. Williamson*, 4 East 469, and *Doe v. Wood*, 2 B. & Al. 724, in *Duke of Sutherland v. Heathcote*, L. R., 1892, 1 Ch. at p. 485.

entered the opening at the time the testator died or the non-testamentary instrument was made :

Prescriptive
right to light
or air.

(c) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used :

Prescriptive
right to pollute
air and
water.

(d) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose : and

Other pre-
scriptive
rights.

(e) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

Commentary.

Easements of
necessity.

The rule here enacted as to easements of necessity is in accordance with the English law as laid down in *Corporation of London v. Riggs*,⁽¹⁾ the first case in which the question came before a Court for decision. In that case the defendant had sold to the corporation certain land entirely surrounding a piece of land of which he retained the ownership. At the time of that sale the landlocked piece of land was used for agricultural purposes only. It was held that the defendant was not entitled to use the way of necessity across the surrounding land for conveying materials for the construction of a house and other buildings, intended to be used for the sale of refreshments to the public, which he was preparing to erect on the landlocked land, and for the passing to and fro of persons frequenting such buildings, if erected, but that

(1) L. R., 13 Ch. D. 798. See also s. 13, *Illustrations (a) and (b)*.

his right of user of the way was limited to the purposes for which the way was needed for the enjoyment of the landlocked piece of land in the condition in which it was at the time of the sale, *viz.* for agricultural purposes. Where a piece of land surrounded by other land of the grantor had been granted, on *fazendari* tenure, for the purpose of a house being built thereon by the grantee to be inhabited by himself, and the suitable enjoyment of such house was proved to imply the use of a privy, it was held that the way of necessity impliedly granted to the tenant to and from his house over the adjoining land of the grantor included a right of passage for sweepers (for such privy).⁽¹⁾ It must be borne in mind that all the rules enacted in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage (see Sec. 20); and this is in accordance with the English law. Accordingly, where a tenement is granted, to which a way of necessity over other land of the grantor attaches, and the grantor professedly grants the tenement for a certain purpose, and the purchase money includes compensation for all damage which may be sustained by the grantor by reason of the grantee effecting that purpose, and, in so doing, injuriously affecting the adjoining land, the grantee is entitled to use the way in such manner as is required for carrying out that purpose, although up to and at the time of the grant it had not been used in such manner.⁽²⁾

The extent of those easements which are acquired, on the severance of tenements, not as being easements of necessity, but as being continuous and apparent easements and enjoyed as *quasi*-easements before and up to the time when the severance took place, is not specially dealt with in this section. It was perhaps considered to be sufficiently clear from the terms of Sec. 13, paragraphs (b), (d) and (f), that the extent of such easements is the extent to which they were

Continuous and apparent easements acquired on severance of tenements.

(1) *Esubai v. Damodar Ishwardas*, I. L. R., 16 Bom. 552.

(2) *Serff v. Acton Local Board*, L. R., 31 Ch. D. 679, 685.

enjoyed, as *quasi*-easements, immediately before the severance took place.

Right to water for domestic purposes.

An easement consisting of a right of a tenant of a dwelling-house to take water from a well for domestic purposes does not include a right to take water for purposes of building operations which are being carried on by him on the premises of which he is such tenant.⁽¹⁾

Easements created by grant in writing, or by Statute.

In the case of easements created by grants in writing or by legislative enactment, the intention and purpose must of course be ascertained in accordance with the ordinary rules for the construction of documents or Statutes ;⁽²⁾ if the terms of the instrument are ambiguous, in accordance with the provisions of Secs. 93, 94, 95, respectively, of the Evidence Act, according as the ambiguity is patent or latent. In *Taylor v. Corporation of St. Helens*—a case of an easement granted by deed—JESSEL, M. R., in his judgment, condemned as erroneous and obsolete the maxim that an instrument of grant, if there is any difficulty or obscurity as to its meaning, is to be read strongly against the grantor. He also there said : “ The true rule of construction is to construe the language of the instrument according to its ordinary meaning, giving to technical terms their technical meaning, unless we find a context such as to convince the mind that the ordinary rules of construction which would be applied to the original expressions standing alone ought not to be applied.” . . . “ If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled.”⁽³⁾

Rights of way created by express grant.

The extent of rights of way created by express grant, depends upon the terms of the grant. Where, together with the right of mining in the servient land, a right of way over it was reserved to the dominant owner under the terms “ together with all convenient and necessary ways,” &c., in

(1) *Esubai v. Damodar Ishvardas*, I. L. R. 16 Bom. 552, 560.

(2) *United Land Co. v. Great Eastern Railway Co.*, L.R., 10 Ch. App. 586.

(3) L. R., 6 Ch. D. 270, 271.

an action raising the question of the extent of his right, the Court held that upon the construction of these words "the true question is not whether the road has been made in the direction, or in the manner, least injurious to the owner of an allotment; or in that direction, or by that mode, which a strict and rigid necessity would point out; much less whether it has been made in that direction or by that mode, which, upon a view of the work when accomplished, and when a better judgment may possibly be formed than could have been formed before, may be thought by persons possessing the highest degree of skill and experience to be the best that could have been devised; but whether the direction chosen has been such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted has been such as a prudent and rational person would have adopted, if he had been making the road over his own land and not over the land of another." (1) In *Dand v. Kingscote*, (2) by a deed, in 1630, the predecessor in title of the defendant conveyed certain land to the predecessor in title of the plaintiff, reserving the mines of coal therein and right of mining for such coal "together with sufficient way-leave to and from the said mines." For two centuries the mode of exercising the right of way was the ordinary mode in use before the invention of railways. After the invention of railways, the defendant, in 1837, constructed a railway for the conveyance of the coal from the pits. It was held that he was entitled to make this alteration in the mode of exercising his right of way. "There is no doubt," said the Court in their judgment, after referring to the terms of the reservation in the deed, "that the object of the reservation is to get the coals *beneficially* to the owner of them; and therefore it should seem that there passes by it a right to such a description of way-leave, and in such a direction, as will be reasonably *sufficient* to enable the coal owner to get from time to time all the seams of coal to a reasonable profit;

(1) *Abson v. Fenton*, 1 B. & C. 195, 203.

(2) 6 M. & W. 174; 9 L. J. (N. S.) Exch. 279.

and therefore the owner is not confined to such description of way as is in use at the time of the grant, and in such a direction as is then convenient.”⁽¹⁾ Under a grant of a way in, through, over and along a close from one point to another, with full liberty to carry materials in, through, over and along the said way when, whither, as often as and in what manner to the grantee should seem convenient, he cannot make a transverse road, across the way leading from the one to the other specified point.⁽²⁾ Where by deed was granted “a free and convenient way” “for carts, waggons, wains, and other carriages,” for the carriage of (*inter alia*) coals, the grantee was held to be entitled to lay a framed waggon-way for carrying coals, framed waggon-ways being more convenient for the carriage of coals than any others and being in use at all the great collieries.⁽²⁾

Rights of way
acquired by
prescription.

As to rights of way acquired by prescription, if the way has been used for a particular purpose only, or for particular purposes only, the presumption will be that there is no right to use it for other purposes or for any and all purposes generally; but if the way has been used for several purposes, or a variety of purposes, there may be ground for inferring a right to use it for all purposes.⁽³⁾ User of a way for residential and agricultural purposes while the dominant tenement consisted of a farm and farm-house, does not establish a right to use it for the purpose of bringing materials for the erection of houses on the land when converted into house-sites and for all purposes connected with those houses when built.⁽⁴⁾ User of a way as a carriage-way and for driving hogs, which are animals not dangerous to passers by, was held to be insufficient to support a claim of right to use it for driving cattle, which are animals which may do harm to passengers.⁽⁵⁾

(1) 9 L. J. (N. S.), Exch. 288. See also *Newcomen v. Coulson*, L. R., 5 Ch. D. 183.

(2) *Senhouse v. Christian*, 1 T. R. 560; 1 B. R. 300.

(3) *Cowling v. Higginson*, 4. M. & W. 245, 256.

(4) *Wimbledon & Putney Commons Consrs. v. Dixon*, L.R., 1 Ch. D. 362.

(5) *Ballard v. Dyson*, 1 Taunt. 279.

A right to access of light or of air to a door can be acquired, although the door is not used exclusively for the reception of air or light, but is also used for the ordinary purposes of a door.⁽¹⁾

Paragraphs
(b) and (c).
"Door."

The question as to the extent of the right to light which, on the transfer of a newly built house, the transferee of the house acquires over adjoining or neighbouring land belonging to and retained by the transferor, came before KEKEWICH, J., for decision in *Corbett v. Jonas*,⁽²⁾ in which the transfer of the house was a lease, and it was held that, in such a case, in the absence of a special bargain express or implied, the transferee is entitled to sufficient light for the ordinary purposes for which a house in the locality is at the time of the contract for the transfer used or may be expected to be thereafter used, and that he is not entitled to such an amount of light as is required for the use of rooms of the house for a special purpose demanding an extraordinary amount of light. In that case, the lessee of the house, which was in the City of London, underlet some of the rooms of the house to wool-brokers, who used them for their business of sorting and valuing samples of wool, for which purpose a special amount of light was required. The owner and original lessor of this house who, at the time of the original lease, owned another house separated from the former house by an intervening street, sold that other house, subsequently to that lease, to the defendant. The wool-brokers sued the defendant for an injunction restraining him from erecting a new house which he proposed to build, on the site of his existing one, higher than it. It was proved that if a house of the proposed elevation was built by the defendant, the use by the plaintiffs of their rooms for the purpose of their wool-broking business would be substantially interfered with, but that for all ordinary purposes of business as commonly carried on in the City of London the rooms would still be in the enjoyment of good

Paragraph (b).

(1) *Bottlewalla v. Bottlewalla*, 8 Bom. H. C. R., O. C. 181, 190.

(2) L. R., 1892, 3 Ch. 137.

and sufficient light. There was no evidence of any special bargain between the original lessor and lessee of the house in which were the rooms occupied by the plaintiffs, affecting the question of the amount of light to which the lessee became entitled. Under these circumstances the suit was dismissed. In *Birmingham, Dudley, & District Banking Co. v. Ross*,⁽¹⁾ BOWEN, L. J., said, in his judgment: "But coming to the amount of enjoyment of light that is supposed by the law to accompany in an ordinary case the lease or the grant of a house which is erected with window-lights, where the grantor of the house is also the owner of premises either adjoining or neighbouring, then this presumption arises, that the grantor intends the grantee to enjoy so much light unobstructed as must under the circumstances have been assumed by both parties to be reasonably necessary for the fair and comfortable use of the premises which are the subject of the grant. That seems to me to be the real definition and measure of the ordinary implication that arises." By the law as laid down in sub-section (b) of this section, the extent of the right to light to which a transferee of a house would become entitled on the transfer, in the absence of anything in the instrument of transfer, or in the circumstances under which the transfer was made, showing what the extent of such right was intended by the parties, or, in the case of a testamentary or other unilateral instrument of transfer, by the transferor, to be, does not appear to be limited to such an amount as would be required for any ordinary purposes for which the house might be used, but appears to be the full amount of light which the windows, or other openings for the admission of light, received at the time when the transfer took effect.

Prescriptive
right to light.

According to a less recent English decision⁽²⁾ the extent of an easement of light acquired by prescription was measurable by the purpose for which the light had been, to the

(1) L. R., 38 Ch. D. 295, 313.

(2) *Lanfranchi v. Mackenzie*, L. R., 4. Eq. 421.

knowledge of the servient owner, used by the dominant owner; but this view must be considered to be overruled by subsequent cases,⁽¹⁾ by which the measure of the extent of such an easement has been held to be the amount of light which has been enjoyed in respect of the aperture during the prescriptive period, whether the whole of that amount of light has or has not been required and used during that period by the dominant owner. As remarked above (see note to Sec. 15,—p. 123), enjoyment of light through an aperture does not necessarily involve personal enjoyment of it; the existence of the window or other aperture in the building constitutes enjoyment of the light through the aperture. In *Turner v. Spooner*⁽²⁾ the plaintiff was entitled to ancient lights in respect of two windows. During the twenty years prescriptive period the windows were windows with large frames and a wooden mullion in the centre and small casements with leaden frames, and one of them had iron bars across it. Subsequently the plaintiff removed these windows and substituted for them windows of the modern construction with plate glass, which had the effect of admitting considerably more light into the rooms, but he did not enlarge the apertures occupied by the old windows. In a suit for an injunction against the defendants who had erected a structure with the object of preventing the access of the additional light through the plaintiff's newly constructed windows, it was held that a person possessed of ancient lights is entitled to acquire an increased quantity of light by altering the construction of the windows, provided he does not increase the dimensions of the apertures. The law as laid down in sub-sec.(c) of this section appears to differ from the English law, as the measure here laid down is not the quantity of light which has been enjoyed in respect of the aperture, but the

(1) *Yates v. Jack*, L. R., 1 Ch. App. 295; *Moore v. Hall*, L. R., 3 Q.B.D. 178; *National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.*, L. R., 6 Ch. D. 757; *Attorney-General v. Queen Anne and Gardens Mansions*, 5 Times L. R. 430; *Lazarus v. Artistic Photographic Co.*, L. R., 1897, 2 Ch. 214; *Mackey v. Scottish Widows' Society*, Ir. R., 11 Eq. 541.

(2) 30 L. J. (N. S.), Ch. 801.

quantity "which has been accustomed to enter" it, during the prescriptive period; and it would seem therefore that if a case similar to *Turner v. Spooner* arose for decision under this Act, the decision would have to be the reverse of the decision in that case. In accordance with the latest previous decisions as to the true measure of a prescriptive right to light, in *Lazarus v. Artistic Photographic Co.*⁽¹⁾ the plaintiff, who had acquired a prescriptive right to access of light to a studio through a window, was held to be entitled to a mandatory injunction against the defendant, who had erected a building which interfered with the access of light to the plaintiff's studio, through the window, as required by him in the use of the studio for the special or extraordinary purpose of photography, though the plaintiff had been using the studio for less than twenty years for that purpose, viz. from 1887, when he commenced his business as a photographer, to 1897, when the obstruction was created, and for the previous portion of the prescriptive period had been using the studio for purposes requiring only an ordinary amount of light, and though the obstruction was not such as to interfere with the access of so much light as was required in the enjoyment of the studio for such ordinary purposes.

Prescriptive right to pollute air or water.

Paragraph (e). User as showing extent of easement.

The rule in paragraph (d) is in accordance with the English law.⁽²⁾

The user may have been more frequent during part of the prescriptive period than during the rest of the time, and yet a prescriptive right to the extent of the more frequent use may have been acquired. In *Jadulal Mullick v. Gopalchandra Mukerji*⁽³⁾ the plaintiffs claimed a right by prescription to have the refuse of a privy, situate on their premises in Calcutta, removed along a passage through the defendant's premises. Up to 1876 the refuse had, for more than sixteen

(1) L. R., 1897, 2 Ch. 214.

(2) *Crossley & Sons (Ld.) v. Lightowler*, L.R., 2 Ch. App. 478. See also *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L.R., 1 Ch. App. 349, 352.

(3) 1. L. R., 13 Cal. 136. See also the judgment of GARTH, C. J., in that case, in the High Court, 1. L. R., 9 Cal. at p. 786.

years, been removed several times in the course of the year by scavengers employed by the plaintiffs. In that year an Act was passed by which it became obligatory on the plaintiffs to have the refuse removed by the servants of the Municipality daily, and this was done during the remaining years of the period of prescription. It was held that as there was nothing to show that the plaintiffs might not, throughout the whole period, have used the passage, for the purpose in question, every day, if they had chosen to have the refuse removed daily, instead of at long intervals of time after a large quantity had accumulated, as they had done up to 1876, they had acquired a right to use the passage, for the purpose, daily.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement. Increase of easement

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations.

(a) A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.

(b) A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is

responsible to the lower riparian owners for injury done by such increase.

(c) A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B's land. A buys a field and unites it to his farm. A is not thereby entitled to take leaves to manure this field.

Commentary.

Light.

If the wall of a house, in which there are windows in respect of which the owner has an easement of light, be pulled down and a new wall built further back from the servient tenement, and in the new wall windows are made of the same size and in the same relative position as the former windows in the former walls, the easement is not destroyed; the burden on the servient tenement is not materially increased, but rather lessened, by the alteration in the dominant tenement.⁽¹⁾

Light.

An easement of light cannot be increased by enlarging the window or other aperture through which the light is received; unless and until, at least, a right by prescription has been acquired to the access of the light to the added portion of the aperture so enlarged.⁽²⁾ The right of the servient owner to block up the added portion and prevent the prescriptive acquisition of a right of light thereto is, however, in some cases rendered ineffectual by the fact that he cannot build so as to obstruct the access of light to such new portion without obstructing its access to the old portion of the enlarged window, and that in such a case he is not entitled to so build; see Sec. 31 and *Illustration* thereto.

If an alteration in the form and structure and glazing of a window, the object and effect of which is to admit more light through the window, be made by the dominant owner, the increase of light thus admitted is, by the English law, no increase beyond what he was entitled to before the alteration

(1) *Barnes v. Loach*, L.R., 4 Q. B. D. 494, 498; *National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.*, L. R., 6 Ch. D. 757.

(2) *Cooper v. Hubbuck*, 30 Beav. 160; *Tapling v. Jones*, 11 H. L. C. 290.

was made, provided the whole aperture occupied by the window be not enlarged⁽¹⁾; but it appears to be otherwise under the law of this Act; see note to Sec. 28 (pp. 195, 196).

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any) under which the division was made, and in the case of prescriptive rights, with the user during the prescriptive period.

Partition of
dominant heri-
tage.

Illustrations.

(a) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(b) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, the other to B. A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(c) A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

Commentary.

So, a right, annexed to a dwelling-house, to a pew in a church may be apportioned: if the house be divided into two or more portions, owned or occupied by different persons,

(1) *Turner v. Spooner*, 30 L. J. (N. S.) Ch. 801.

the owner or occupier of each portion has some right to use the pew.⁽¹⁾ And a right of common of pasture whether appendant or appurtenant to a tenement is apportionable on a severance of the dominant tenement.⁽²⁾ So, in *Newcomen v. Coulson*,⁽³⁾ in which the defendant had purchased a portion of one of the allotments into which certain land had been divided by an award under an Inclosure Act, by which each allottee was entitled to a certain right of way, and it was contended that the right of way of an allottee could not be split up by division of the allotment, this contention was overruled by the Court of Appeal. JESSEL, M. R., in his judgment said: "Where the grant is in respect of the lands and not in respect of the person, it is severed when the lands are severed, that is, it goes with every part of the severed lands. On principle, this is clear. It never could have been contemplated in the case of an award like this that the property was never to be divided, nor is it to be contended that if a man died and left two or three daughters co-heiresses, and they partitioned the estate, the right of way was lost, and their allotments for ever deprived of access to the highway. But, in addition to that, I think that the case is fairly covered by authority." His Lordship then referred to *Harris v. Drewe* and *Codling v. Johnson*.⁽⁴⁾

In the absence of anything to the contrary in the document (if any) by which the division of the dominant tenement is effected, the extent and mode of user of the easement to which the holders of the divided portions are entitled must of course depend upon the terms of the enactment, deed, or other instrument by which the easement was originally created, if it was so created; and upon the rules as to the extent and mode of enjoyment of prescriptive easements, if the easement had its origin in prescription.⁽⁵⁾

(1) *Harris v. Drewe*, 2 B. & Ad. 164.

(2) *Sacheverell v. Porter*, W. Jones, 396; *Wild's case*, 8 Rep. 73b, 156; *Tyringham case*, 4 Rep. 36. And see per TAUNTON, J., in *Harris v. Drewe*, 2 B. & Ad., at p. 168; and per BOWEN and FRY, L.JJ., in *Baring v. Abingdon*, L. R., 1892, 2 Ch. 395, 402.

(3) L. R., 5 Ch. D. 133.

(4) 9 B. & C. 933, 934.

(5) See s. 28.

Where the dominant owner was entitled, under a section of an Act of Parliament, to such convenient communications across, over or under a railway as was necessary for the convenient enjoyment and occupation of his land, through which the railway was carried, and level crossings had accordingly been made, and subsequently a part of the dominant land, consisting of marsh or pasture land, was, together with rights of way over the rest of the land and over the railway by two of the level crossings, transferred to a Land Company, who proceeded to offer it for sale in building lots, it was held, with reference to the terms of the enactment, that the occupiers of the houses to be built would be entitled to make use of the level crossings, and that the use of the level crossings could not be restricted to the use which was had by the original dominant owner, but that there was nothing to restrain either the original dominant owner or persons claiming under him from using the level crossings for the beneficial enjoyment of the land, to whatever purpose the land might be appropriated, "subject of course to not improperly interrupting the traffic" of the railway.⁽¹⁾ *Newcomen v. Coulson*⁽²⁾ was a case depending on the terms of an award made under an Inclosure Act more than 100 years before the case arose. The award-deed provided that the "owners for the time being of the lands hereby to them respectively allotted, shall for ever hereafter have and enjoy a way-right and liberty of passage for themselves and their respective tenants and farmers of the said lands and grounds, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen and other cattle, as often as occasion shall require," from a certain highway to "their said respective allotments" and *vice versâ*, and that in case the owners of the respective allotments for the time being, or any of them, should "street out" the way, the same should be made and for ever remain eleven yards broad at the least.

⁽¹⁾ *United Land Co. v. Great Eastern Ry. Co.*, L. R., 10 Ch. App. 536; 17 Eq. 158.

⁽²⁾ L. R., 5 Ch. D. 133.

The defendants, the owners of a portion of one of the allotments, commenced building houses upon it and laying down a metalled road, suitable for carriages, in lieu of the cart-track which had theretofore existed, between the highway and his plot. It was contended that the award conferred a right to the allottees to use the way only so long as their respective allotments were used for agricultural purposes, for which purposes the land was used at the time when the award was made, and that the defendants were therefore not entitled to convert the cart-track into a metalled road. The Court of Appeal decided, against this contention, that, under the terms of the award-deed, the owners of the allotments, or of portions of them, were entitled to use the way in the mode requisite for the beneficial enjoyment of their land, for whatever purpose they, in right of ownership, might use their land, and that the defendants were therefore within their rights in constructing the metalled road.⁽¹⁾

In *Bower v. Hill*⁽²⁾ there were certain premises consisting of an inn called "The King's Head" and yard attached, and between the yard and a certain watercourse there was a strip of land or frontage which belonged to the owner of the inn and yard. About 5 years before the suit the occupier of the inn and yard had closed the yard by putting up gates and thereby separated it from the frontage, and the plaintiff was in possession of the frontage from that time. The owner of the inn and yard had acquired, by user raising the presumption of a grant, a right of way across the watercourse; but for the last 16 years before the suit there had been no user of this way. The plaintiff claimed a right of way across the watercourse as being the occupier of a portion of the entire property in respect of which the right had been acquired, but the Court of Common Pleas decided against his claim. The judgment went on the ground that the evidence of the

(1) This case *JAMES, L. J.*, in his judgment said (see *L. R.*, 5 Ch. D. p. 145) was not, in his opinion, "one-tenth part as strong or as difficult as *Dand v. Kingscote*" [6 M. & W. 174; 9 L. J. (N. S.), Exch. 279]. See note on that case in commentary on s. 28.

(2) 2 Bing. (N. C.) 339,

user of the way "was referable to the *King's Head Inn* and yard, and to those premises only," and that therefore the grant to be presumed was a grant only to the owner or occupier of the inn and yard; and also upon the ground that "the occupier of the *King's Head Inn* and yard may resume the user at any time, by taking any part of the frontage into his own possession, so as to have access to the dyke; and the consequence would be, if the plaintiff were held to be entitled to the right of passage, that two different persons would be entitled to use it for themselves and their servants with boats and barges, or indeed as many different persons, as possessed any share of the frontage. This would be an unreasonable construction against the grantor, who may have been contented to grant the right to the occupier of the *King's Head Inn* and yard, from his knowledge of the degree of user which would follow from the grant when so limited."⁽¹⁾

Obstruction in case of excessive user.

31. In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration.

A, having a right to the free passage over B's land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive user.

Commentary.

See notes to Sec. 43, and Sec. 33, *Expl. II.*

The *Illustration* seems an unfortunate one. By enlarging windows in respect of which he has a right of light, or open-

(1) 2 Bing. (N. C.), at p. 342.

ing new ones, the owner of the building does not add to his user of the *easement*: there is no excessive user of the *easement*. To say that there is, seems to be repeating the error made in *Renshaw v. Bean*⁽¹⁾ and *Hutchinson v. Copestake*,⁽²⁾ which were overruled by the House of Lords in *Tapling v. Jones*.⁽³⁾ In *Renshaw v. Bean* and *Hutchinson v. Copestake* the Court held that the owner of a house having ancient lights, by enlarging the old windows and adding new ones in such manner that it was not possible for the servient owner to obstruct the new windows and the enlargements of the old windows without obstructing the ancient lights, had "exceeded the limits of his former right," and thereby had lost his right to the ancient lights. In his judgment in *Tapling v. Jones* Lord CHELMSFORD, referring to the decision in *Renshaw v. Bean*, said: "It is not correct to say that the plaintiff, by putting new windows into his house or altering the dimensions of the old ones, "exceeded the limits of his right," because the owner of a house has a right at all times (apart, of course, from any agreement to the contrary) to open as many windows in his own house as he pleases."⁽⁴⁾

CHAPTER IV.

THE DISTURBANCE OF EASEMENTS.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

Illustration.

A, as owner of a house, has a right of way over B's land. C unlawfully enters on B's land, and obstructs A in his right of way. A may sue C for compensation, not for the entry, but for the obstruction.

(1) 13 Q. B. 112.

(2) 8 C. B. (N. S.) 102; 9 C. B. (N. S.) 863.

(3) 11 H. L. C. 290.

(4) 11 H. L. C. at p. 317.

Commentary.

Although a person who has no easement over his neighbour's immoveable property but is enjoying some benefit from it (as, *e.g.*, support for a new building) which, if he had the right to enjoy it, would be an easement, has, of course, no right of action against such neighbour, if the latter, in the exercise of his rights of enjoyment of his own land, interferes with the enjoyment of such benefit by the former, yet he has a right of action against a third party who, having no right to or in such neighbour's immoveable property, interferes with such enjoyment of benefit from that property by the first-mentioned person. Thus in *Jeffries v. Williams*⁽¹⁾ the plaintiff's case was that the defendant had worked mines in land adjoining the plaintiff's land and thereby caused certain buildings on the plaintiff's land to fall, and that the defendant had no right to such adjoining land or to mine therein, and it was held that plaintiff's case disclosed a good cause of action. As against the owner of the adjacent land or any person having a right to enjoy it, the plaintiff would have to show a right to support from that land, but as against a person having no right in that land or to enjoy it, and who was therefore, according to the plaintiff's case, a wrong-doer, it was not necessary to show this. "If," said PARKE, B., in the judgment of the Court delivered by him,⁽²⁾ "a house is *de facto* supported by the soil of a neighbour, this appears to me to be sufficient title against any one but that neighbour, or one claiming under him. Just as one who should prop his house up by a shore resting on his neighbour's ground would have a right of action against a stranger, who, by removing it, caused the house to fall; but none against his neighbour, or one authorized by his neighbour to do so, if he took it away and caused the same damage: and this explains why there was no allegation of the right to the support of the adjoining soil in *Smith v. Martin*;⁽³⁾ whereas, when the

(1) 5 Exch. 792; see also *Bibby v. Carter*, 4 H. & N. 153.

(2) 5 Exch., at p. 800.

(3) 2 Saund. 394.

defendant appeared to be the owner of the adjoining soil, the declaration was held bad for want of the allegation of a right, as in *Wyatt v. Harrison*(1) and *Peyton v. Mayor of London*.”(2)

An easement is a right *in rem*, a right against third persons as well as against the servient owner; but inasmuch as the dominant owner has no proprietary right in the servient tenement, he cannot prevent a third person, even though he be a trespasser, from using the servient tenement, unless he uses it so as to disturb the dominant owner in the exercise of his easement.(3)

The High Court of Calcutta has held that a suit does not lie under S. 9, Specific Relief Act, by a person entitled to a right of fishing in waters covering land not belonging to him, for recovery of possession of the fishery, such fishery not being, it was held, “immoveable property” within the meaning of that section.(4)

The contrary has been held by the Bombay High Court(5); and the Madras High Court has held that a right of ferry is “immoveable property” within the meaning of that section.(6)

Suit for disturbance of easement.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto; provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage with-

(1) 3 B. & Ad. 371.

(2) 9 B. & C. 725.

(3) *R. v. Jolliffe*, 2 T. R. 90; *Clifford v. Hoare*, L. R., 9 C. P. 362.

(4) *Fadu Jhala v. Gour Mohun Jhala*, I. L. R., 19 Cal. 544 (Full Bench); *Natabar Parue v. Kubir Parue*, I. L. R., 18 Cal. 80.

(5) *Bhundul Panda v. Pandol Pos Patil*, I. L. R., 12 Bom. 221.

(6) *Krishna v. Atilanda*, I. L. R., 13 Mad. 54.

in the meaning of this section and section thirty-four.

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations.

(a) A places a permanent obstruction in a path over which B, as tenant of C's house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.

(b) A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to A.

Commentary.

When the damage sustained through the act of any one of a plurality of defendants is inappreciable and would be insufficient if it stood alone to give a right of action, but the damage caused by them all in the aggregate is substantial, it

Substantial
damage.

is no defence for any one of the defendants to say that his acts cause no substantial damage.⁽¹⁾

Threatened
or intended
damage.

The words "has actually caused" appear to show that, under this Act, compensation for threatened or intended damage could not be recovered. "The question whether the Court has jurisdiction," said LINDLEY, L. J., in the judgment of the Court of Appeal delivered by him in *Martin v. Price*,⁽²⁾ "to award damages by way of compensation for an injury not yet committed, but only threatened and intended, is by no means free from difficulty. On the one hand this Court, in *Dreyfus v. Peruvian Guano Co.*,⁽³⁾ expressed a clear opinion against the existence of such jurisdiction.⁽⁴⁾ On the other hand it has been very commonly assumed, and there are several observations by eminent judges favouring the view, that there is such a jurisdiction; and in *Holland v. Worley*⁽⁵⁾ the late Mr. Justice PEARSON did award damages in lieu of an injunction which, if granted, would have been simply preventive and in no sense mandatory." See further, on this point, note in commentary on S. 35.

Explanation 1.
Suit by rever-
sioner.

If the dominant tenement is in the possession of a tenant, or of a person having a particular estate in it, no disturbance of the easement can, of course, affect the owner or reversioner so far as present enjoyment of the easement is concerned. But he may be affected in respect of his proprietary, or reversionary interest in the easement, for the disturbance, if unchallenged, or suffered to continue without resistance, may afford evidence of abandonment by him of the right, and lessen the value of the dominant tenement. In *Bower v. Hill*,⁽⁶⁾ which was an action by the owner of the dominant tenement, who admittedly had sustained no damage in re-

(1) *Thorpe v. Brumfitt*, L. R., 8 Ch. App. 656; *Chunder Coomar Mookerji v. Koylash Chunder Sett*, I. L. R., 7 Cal. 665, 674; 8 Cal. 677. See also *Lambton v. Mellish*. *Lambton v. Cox*, L. R., 1894, 3 Ch. 163.

(2) L. R., 1894, 1 Ch. 276, 284.

(3) L. R., 43 Ch. D. 316.

(4) See *per* BOWEN, L. J., at p. 333; and *per* FRY, L. J., and COTTON, L. J., at p. 342.

(5) L. R., 26 Ch. D. 578.

(6) 1 Scott, 526, 534. See also *Harrop v. Hirst*, L. R., 4 Exch. 43, 47; *Williams v. Morland*, 2 B. & C. 916; *Jesser v. Gifford*, 4 Burr. 2141; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Bell v. Midland Railway Co.*, 10 C. B., (N. S.) 287; *Mott v. Shoobred*, L. R., 20 Eq. 22.

spect of enjoyment of the easement from the obstruction complained of, TINDAL, C. J., in the judgment, said: "The erection of the tunnel is in the nature of, and until removed, is to be considered as, a permanent obstruction of the plaintiff's right, and therefore an injury to the plaintiff, even though he receives no immediate damage thereby. The right of the plaintiff to this way is injured if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction apparently permanent to lights and other easements which belong to the reversion. The plaintiff's premises would sell for less whilst the tunnel is in existence, if now put up for sale."

Even when the dominant owner is not in the position of a remainderman or a reversioner, but is in actual possession of the dominant tenement, he may have a right of action for disturbance of an easement although no immediate damage susceptible of pecuniary valuation has been produced by the disturbance. Thus in *Harrop v. Hirst*⁽¹⁾ the plaintiffs, who as inhabitants of a certain district had a customary easement to take water from a certain spout for use for domestic purposes, were held entitled to recover nominal damages from the defendant, who was the owner of land through which the stream which supplied the spout flowed, for having abstracted water from the stream to such an extent as to render the quantity reaching the spout insufficient for the needs of the inhabitants, though the jury found that the plaintiffs had not themselves suffered any actual damage or inconvenience; the ground of the decision being that the fact of the defendant abstracting from time to time the water to which the plaintiffs were entitled might furnish evidence in derogation of their right and in support of an adverse claim of right in the defendant. The Court approved and followed a passage

(1) L. R., 4 Exch. 43.

in the note to *Mellor v. Spateman* in 1 Wms. Saunders, 346(a), where it is laid down that a commoner may have an action on the case without proving *any specific injury* to himself against a person wrongfully depasturing cattle on the common; and the author observes: "The law considers that the *right* of the commoner is injured by such an act, and therefore allows him to bring an action for it to prevent a wrong-doer from gaining a right by repeated acts of encroachment. For wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury."⁽¹⁾ Similarly in the case of natural rights, an invasion of the right is actionable even though it cause no pecuniary damage, because it affords evidence which may be used in support of a claim of right (an easement) in derogation of the natural right.⁽²⁾ In *Swindon Waterworks Co., v. Wilts & Berks Canal Navigation Co.*, Lord CAIRNS, L. C., in his judgment said: "It is a matter quite immaterial whether, as riparian owners of Wayte's tenement, any injury has now been sustained, or has not been sustained, by the respondents. If the appellants are right, they would at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of the property, the riparian right of Wayte's tenement."⁽³⁾

Explanation
II.
Light.

In *Back v. Stacey*,⁽⁴⁾ BEST, C. J., speaking of the right of the occupier to maintain an action for obstruction of light, said: "In order to give a right of action and sustain the issue there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done."

(1) L. R., 4 Exch. 46, 47.

(2) See, as to cases of rights of riparian owners, *Swindon Waterworks Co. v. Wilts & Berks Canal Navigation Co.*, L. R., 7 H. L. 697; *Ormerod v. Todmorden Mill Co.*, L. R., 11 Q. B. D. 155, 159; and, as to cases of natural right to support, *Attorney-General v. Conduit Colliery Co.*, L. R. 1895, 1 Q. B. 301, 311, and note to s. 34. See also note to s. 7, Ills. (e) and (h) and (j), (pp. 28, 35, 36).

(3) L. R., 7 H. L., p. 705.

(4) 2 C. & P. 465.

This dictum was approved of in *Dent v. Auction Mart Co.*,⁽¹⁾ subject to reading 'or' for 'and.' It has apparently been followed by the Indian Legislature in framing this *Explanation*. The remedy therefore given by this *Explanation* does not appear to be co-extensive with the right as defined in Sec. 28(b) and (c); for the right is there made to be a right to the light entering the window, irrespective of the use to which the light was put, but here the remedy is confined to cases where the actual accustomed use to which the light has been put is interfered with. In *Bagram v. Khettranath Karformah*,⁽²⁾ a case under the law of India as it stood before Act IX of 1871 came into force, in which the claim to a right to light was based on prescription or a presumed grant, it was held that the only amount of light for a dwelling-house which could be claimed by prescription or by length of enjoyment, without an actual grant, was "such an amount as was reasonably necessary for the convenient and comfortable habitation of the house," and that therefore no suit would lie for interference with such a right to light unless there was an interference with such amount of light: and in *Delhi and London Bank, Ltd. v. Hem Lall Dutt*⁽³⁾ it was held that that statement of the law held good as to cases governed by Act IX of 1871 or by Act XV of 1877.

In England, in the case of easements of light, inasmuch as the measure of the extent of the right is not the purpose for which the light has been as a matter of fact used by the dominant owner, but the quantity of light receivable through the window or aperture, it has been held that in estimating the damages for interference with the right, the Court may and ought to take into consideration future probabilities as to the use of the room to which the window belongs. It may consider not only the actual present use of the window, but any purpose to which it may reasonably be expected that in the future it may be applicable.⁽⁴⁾ The terms of this section

(1) L. R., 2 Eq. 238.

(2) 3 Beng. L. R., O.J. 18, 45.

(3) I. L. R., 14 Cal. 839, 855.

(4) *Moore v. Hall*, L. R., 3 Q. B. D. 178.

and *Explanation II* thereto, do not, it seems to me, admit of this being done by a Court in India, in a case governed by this Act, but confine the damages recoverable to damages for disturbance affecting the use to which the light is or has been already put. See also note to Sec. 35.

It is no defence to an action for obstruction of the plaintiff's lights, that the plaintiff has himself contributed to the diminution of the light by enlarging or altering his own buildings.⁽¹⁾ Nor is it any defence to such an action, that by the removal of buildings by third parties or by the plaintiff himself the plaintiff's windows have received an accession of light equal to or greater than the quantity of light of which they were deprived by the defendant's obstruction.⁽²⁾ Nor is the fact that the building erected by the defendant is not opposite to the plaintiff's windows, but stands obliquely to them, any defence; though, as a matter of evidence, more evidence is required to prove a material injury to light by lateral or oblique obstruction than in a case of direct obstruction.⁽³⁾ Nor is the defendant protected by the fact that the plaintiff had made additional windows or had enlarged the old ones, and that it was impossible for the defendant to exercise his right of building so as to obstruct the new windows (or the new portions added to the old windows) without substantially interfering with the light to which plaintiff had a right in respect of the old windows (or the old portions of the altered windows).⁽⁴⁾ In a case, indeed, decided subsequently to *Tapling v. Jones*, by Lord ROMILLY, M. R., viz. *Heath v. Bucknall*⁽⁵⁾ it was held that where the dominant owner rebuilds his house to a much greater height than before

(1) *Staight v. Burn*, L. R., 5 Ch. App. 163; *Baxter v. Bower*, 44 L. J., Ch. 625.

(2) *Dyers' Co. v. King*, L. R., 9 Eq. 438.

(3) *City of London Brewery Co. v. Tennant*, L. R., 9 Ch. App. 212, 220; *Attorney-General v. Nichol*, 16 Ves. 338, 342; 10 R. R. 186; *Clarke v. Clark*, L. R., 1 Ch. App. 16; *Staight v. Burn*, L. R., 5 Ch. App. 163; *Parker v. First Avenue Hotel Co.*, L. R., 24 Ch. D. 282.

(4) See s. 31 and *Illustration* thereto, and *Tapling v. Jones*, 11 H. L. C. 290, overruling *Renshaw v. Bean*, 18 Q. B. 112, and *Hutchinson v. Copestake*, 9 C. B., N. S. 863.

(5) L. R., 8 Eq. 1.

and replaces the old windows overlooking the defendant's land with other and larger windows which only partially coincide with the old ones, and also builds additional windows overlooking the defendant's land, though he is entitled to damages for the obstruction to the light to the extent to which his easement existed before the alterations, he is not entitled to the remedy by way of injunction. But the decision in *Heath v. Bucknall*, if it meant to lay down the proposition that a dominant owner who has enlarged his old windows or constructed additional windows and who is entitled to damages, is nevertheless not entitled to the relief by way of injunction, was dissented from in the subsequent case of *Staight v. Burn*⁽¹⁾ decided by GIFFORD, L. J., who, however, said that he took *Heath v. Bucknall* as having been decided upon its own particular circumstances; those circumstances, as he gathered them, being that a very small and almost inappreciable proportion of the ancient window was preserved and the rest was new, so that there would have been no material damages at law.

Where the dominant tenement is in the possession of a tenant, or a person having a limited or temporary interest therein, if the obstruction to the access of light is of a temporary nature, the landlord, remainderman, or reversioner (as the case may be) is not affected and has no ground of suit either for compensation or for an injunction⁽²⁾; but if the obstruction is of a permanent character such as not only to affect the occupier by interfering with his enjoyment of the tenement, but also to affect the landlord, remainderman or reversioner by lessening the value of the reversion, or the remainder, or affecting the evidence of the easement, a suit by the person entitled to the reversion, or the remainder, will lie, either for damages or an injunction.⁽³⁾

Reversioner's right, where dominant tenement in possession of person having limited interest.

The right to air has often been in English cases and books erroneously coupled with the right to light as if the two

Explanation
III.

(1) L. R., 5 Ch. App. 163.

(2) *Kino v. Rudkin*, L. R., 6 Ch. D. 160; *Cooper v. Crabtree*, L. R., 20 Ch. D. 589.

(3) *Wilson v. Townsend*, 1 Dr. & Sm. 324; *Metropolitan Association v. Petch*, 5 C. B., N. S. 504.

were co-extensive, so that what would amount to an actionable obstruction in the one case must also be such an obstruction in the other. This error was pointed out in (amongst other cases) *City of London Brewery Co. v. Tennant*⁽¹⁾ by Lord SELBORNE, L. C., who said: "The nature of the case which would have to be made for an injunction by reason of the obstruction of air is *toto cælo* different from the case which has to be made for an injunction in respect of light. It is only in very rare and special cases, involving danger to health, or at least something very nearly approaching it, that the Court would be justified in interfering on the ground of diminution of air." In *Bagram v. Khettranath Karformah*,⁽²⁾ a case decided before Act IX of 1871 came into force, NORMAN, J., laid it down that "to give a right of action" (the suit was for a mandatory injunction to pull down a building) "in a case where there is no express contract on the subject, for an interference with the access of air to dwelling-houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house, in other words to render the house unfit for the ordinary purposes of habitation or business." The right to air, as defined in that case, was held in *Delhi and London Bank, Ltd. v. Hem Lall Dutt*⁽³⁾, not to have been enlarged by Act IX of 1871 or Act XV of 1877, and the extent of the right, as laid down by NORMAN, J., in the former case, was held to be the same in cases governed by either of those Acts. In *Modhoooodun Dey v. Bissonath Dey*,⁽⁴⁾ a suit for an injunction, MARKBY, J., pointed out the difference between India and England, in regard to the amount of air required to be admitted into houses, resulting from difference of climate. "In England," he said, "an aperture is made chiefly

(1) L. R., 9 Ch. App. 212, 221. See also *Dent v. Auction Mart Co.*, L. R., 2 Eq. 238, 252.

(2) 3, Beng. L. R., O. C. 18, 45 (1869).

(3) I. L. R., 14 Cal. 839, 855 (1887).

(4) 15 Beng. L. R., 361, 367 (1875). See also observations of WEST, J., in *Nandkishor Balgovan v. Bhagubhai Pranvalabhdas*, I. L. R., 8 Bom., p. 97.

for light; the sun being less bright and the air colder there, we desire to obtain all the light we can, and only to admit just as much air as is necessary for wholesome ventilation; for which reason we always use glass in our windows. In this country the object is precisely the reverse—to get as much air as possible, and to exclude the superfluous light;” and he intimated that, if the matter had been *res integra*, he would have held that the right to air in India is not confined to the limits by which it is circumscribed in England, but, being bound by the decision in *Bagram v. Khettranath Karformah*, he held (on the law as it stood prior to the coming into force of Act IX of 1871, which he held could not be applied to the case) that the only right to air which could be gained was “that there should be no obstruction which was a nuisance or injurious to health.” In these cases the nature of the relief sought, being an injunction, formed no ground of the decisions, which would, apparently, have been the same if the suits had been for damages, and not for specific relief. It is clear from this *Expl. III* to Sec. 33, that wherever, in India, this Act is in force, the right to air, whether acquired by prescription or otherwise, and the remedies for its infraction, are enlarged beyond the limits within which they are confined by the Bengal decisions above cited, and are made as extensive as the right and remedies in respect of light. Dr. WHITLEY STOKES, in his Introduction to this Act, ⁽¹⁾ says: “As the law stands both in England and in India, a suit will lie for the disturbance of a right to light where the obstruction interferes materially with the comfort of the plaintiff. But in the case of a right to air, where there is no express contract on the subject, the obstruction, to be actionable, must amount to a nuisance (3 Beng., O. C. 45). It would seem that in a country like India, the right to air is entitled to at least as much favour as the right to light, and that we should not in this respect follow a law fashioned upon the wants of the inhabitants of a northern

(1) 1 Anglo-Indian Codes, 885.

country (15 Beng. 367, 368). The Act accordingly allows a suit for the obstruction of the free passage of air where it interferes materially with the plaintiff's physical comfort, although it is not injurious to health."

A suit for damages or for an injunction is maintainable by one who, though he has not acquired an easement entitling him so to do, is *de facto* in the enjoyment of support, light, or some other benefit in respect of his house, or of some other immoveable property of which he is owner or occupier, over his neighbour's land, if he is disturbed in such enjoyment by a person who is not the owner or lawful occupier of that land, nor has any license or permission from the owner or occupier thereof to do the act in respect of which the suit is brought against him, (1) but is a trespasser on that land. Thus, in *Jeffries v. Williams*, (2) an action by the owner of buildings, who had not acquired an easement of support for such buildings, for damage to such buildings caused by removal of such support, was held to be maintainable against one who was a trespasser on the land of an adjoining owner which afforded the support so removed by him. So in *Achanna v. Venkamma*, (3) a suit for an injunction to pull down a wall erected by the defendant, by which the access of light to the plaintiff's window was obstructed, was held maintainable, though the plaintiff had not acquired an easement of light in respect of such window; the defendant having no right to the land on which he erected the wall nor to erect it thereon, and being a wrong-doer in respect of such erection.

Limitation.

The Limitation Act, XV of 1877, provides specially for suits for damages for obstructing a way or a watercourse, or for diverting a watercourse, the period of limitation being three years from the date of the obstruction or diversion. (4) Suits for damages for disturbances of any easements other than those, apparently fall under Article 36 of Sched. II to

(1) *Dhuman Khan v. Muhammad Khan*, I. L. R., 19 All. 153.

(2) 5 Exch. 792; 20 L. J., Exch., 14. See also *Bibby v. Carter*, 4 H. & N. 153; 28 L. J., Ex. 182.

(3) 5 Madras Law Journal, 25.

(4) Sched. II, Arts. 37, 38.

that Act, which prescribes two years from the malfeasance or misfeasance. Where the disturbance is continued, a fresh cause of action arises, and a fresh period of limitation begins to run, at every moment of the continuance of the disturbance.⁽¹⁾ In the case of obstruction to ancient lights, by the erection of a building a fresh injury is committed and a fresh cause of action arises *de die in diem* so long as the obstructing building remains, as it was erected.⁽²⁾

As to suits for disturbance of "accessory rights," see note to Sec. 24.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

When cause of action arises for removal of support.

Commentary.

As in the case of a natural right to support, so in the case of an easement of support, excavation by the owner (or occupier) of the subjacent or adjacent land in that land even to the extent of entirely removing the natural means of support to the dominant tenement is not an invasion of the dominant owner's right and actionable, provided the servient owner by means of pillars or other artificial supports prevents the fall or subsidence of the dominant tenement. It is not till such a subsidence takes place that a cause of action arises to the dominant owner.⁽³⁾

The term "*substantial damage*" appears to be here (and in Sec. 33) used in the sense of appreciable damage, so as to exclude cases of damage so slight as to come under the rule *de minimis non curat lex*; and not as opposed to damage affecting the right and title of the dominant owner but for which

(1) Act XV of 1877, s. 23; *Punja Kuvarji v. Bai Kuvar*, I. L. R., 6 Bom. 20; *Ponnusawmy Tevar v. Collector of Madura*, 5 M. H. C. R. 6, 24; *Viswambhara Rajendra Devu v. Saradhi Charana Samantaraya*, 3 M. H. C. R. 111, 113; *Subramaniya Ayyar v. Ramachandra Rau*, I. L. R., 1 Mad. 335, 340 (which however was a case of a natural right).

(2) *Jenks v. Viscount Clifden*, L. R., 1897, 1 Ch. 694.

(3) See *Bonomi v. Backhouse*, 9 H. L. C. 503, 512; *Roberts v. Reid*, 16 East, 215.

only nominal damages would be recoverable by reason that the subsidence has not produced any damage measurable in money. It seems clear from the explanation of the term "substantial damage" as used in this section and S. 33, given in *Explanation I* of S. 33, that if a case arose affecting an easement of support similar to the case of *Attorney-General v. Conduit Colliery Co.*,⁽¹⁾ the dominant owner would under this section be entitled, as the plaintiffs in that case were held by COLLINS, J., to be entitled, to a decree for nominal damages against the servient owner. In that case—which was a case of a natural right to support, but the principle of the decision is equally applicable to easements of support—the plaintiffs, the owners of surface land, were held by COLLINS, J., to be entitled to a decree for nominal damages for subsidence of their land caused by the defendants, who owned the subjacent land, although the plaintiffs had sustained no pecuniary loss by the sinkage of their land.⁽²⁾ Causing (by excavation) subsidence of the dominant owner's building even though unaccompanied by any actual pecuniary damage would appear to be "doing an act likely to injure the plaintiff by affecting the evidence of the easement," and therefore to entitle the dominant owner to maintain a suit under this section, though only nominal damages might be recoverable.⁽³⁾

A further question, which is not dealt with in this Act, and which is of great importance as affecting rights of suit for damages for infraction of rights of support, is, whether, in such a suit, the plaintiff must include not only the damage which he has already sustained but also further future damage (if any) expected to result from the same withdrawal of support, and, in default of his so doing, be debarred from afterwards suing for such then expected damage,⁽⁴⁾ or can confine his present claim to the damage already sustained,

(1) L. R., 1895, 1 Q. B. 301, 311. See also judgments of BOWEN and FRY, L. JJ., in *Mitchell v. Darley Main Colliery Co.*, L. R., 14 Q. B. D. 125.

(2) L. R., 1895, 1 Q. B. 311—314.

(3) See also notes to s. 7, *Illustr. (e)*, and s. 33, *Explan. I*.

(4) See Civ. Pro. Code, Act XIV of 1882, s. 43.

and bring a fresh suit, or fresh suits, subsequently for such prospective damage, as and when such prospective damage shall have taken place. This question was decided by the Court of Queen's Bench in *Lamb v. Walker*,⁽¹⁾ an action for injury to the plaintiff's land and buildings by removal of lateral support. The majority of the Court, MANISTY and MELLOR, JJ., held that only one action can be brought for all damage, prospective as well as present, resulting from the same removal of support: that this was the law; they were of opinion both on principle and on authority: both on the ground of the "well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all," and that as soon as the withdrawal of the support was followed by damage, *damnum* and *injuria* concurred, and the cause of action accrued; and also on the authority of *Nicklin v. Williams*⁽²⁾ and *Bonomi v. Backhouse*.⁽³⁾ COCKBURN, C. J., dissented from the other

(1) L. R., 3 Q. B. D. 389.

(2) 10 Exch. 259. In that case the Court held (1) that the removal of the support, not the consequent damage, constituted the cause of action, and (2) that for the wrong "the plaintiffs would have a right to recover a full compensation, including the probable damage to the fabric; and if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong; and if instead of having a verdict, they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong." That case was overruled by *Bonomi v. Backhouse* upon the question of what constitutes the cause of action, but was not so overruled in respect of the second point decided, viz. that there could be only one suit for damages, prospective as well as present.

(3) E. B. & E. 646 (in the Exch. Chamber); confirmed by House of Lords, 9 H. L. C. 503. In that case one of the questions submitted, by consent of the parties, for the decision of the Court, was whether the defendant was responsible for the probable future damage which might be occasioned to the plaintiff's buildings through the withdrawal of support which had occurred (see para. 4 of questions for opinion of the Court, E. B. & E. 633). The Exch. Chamber, in their judgment, said: "The plaintiffs rely upon the ordinary rule that *damnum* and *injuria* must concur to confer a right of action, and that, although only one action could be maintained for damage in respect of such a claim, nevertheless it would be essential that some damage should have happened before a defendant was made liable for an act done in his own land;" and then, commenting on the judgment in *Nicklin v. Williams* as having been really *obiter* and unnecessary so far as it decided what constituted the cause of action, said: "No authority is cited in *Nicklin v. Williams*

two judges. He was of opinion, that the effect of the decision in *Bonbini v. Backhouse* being that the mere withdrawal of the support constituted no wrong and gave no cause of action, not even though from the knowledge of the fact of the excavation in the adjoining land having been made, and the apprehension of possible consequential damage or even the certainty that such damage must result, the value of the plaintiff's property were prejudicially affected, and that it was not till actual damage resulted from the withdrawal of support that the cause of action arose, and then it was the actual damage sustained which was the cause of action, it followed as a logical, as well as a practical, conclusion from this that the plaintiff could only recover in respect of damage actually sustained and that he could not recover, in the same action, in respect of prospective damage. The Chief Justice pointed out in his judgment that the defendant might avert the further progress of the mischief by using artificial means of support, and that if the plaintiff by bringing his action immediately on the happening of a slight amount of damage, could claim and recover therein for prospective damage, he would recover for damage which the defendant had the right to prevent, and might prevent, by such artificial means. He also said: "Nothing could be more unsatisfactory than an inquiry into the possible future effect of underground operations, or more uncertain in its result, depending, as it must do, on the opinion of experts taking the widest range, as dealing with the unknown future." "Yet if the proposed doctrine is to be sustained, it is obvious that, in every case in which an action is brought in respect of actual damage, it will be necessary to go into the question of prospective or

for the judgment there given: and although the judgment in that case is distinct upon the point (as to what constitutes the cause of action) it nevertheless was extra-judicial; for before the former action was commenced it is obvious that actual damage had been sustained; in which case another principle applies, viz. that no second or fresh action can, under such circumstances, be brought for subsequently accruing damage: all the damage consequent upon the unlawful act is in contemplation of law satisfied by the one judgment or accord:" (E. B. & E. 658) and see the judgment of Lord WESTBURY, L. C., in the appeal to the House of Lords, 9 H. L. C., p. 512.

speculative damage, as, if the doctrine I am dealing with is correct, the plaintiff having brought an action, would be forever shut out from bringing another on account of subsequent damage if such damage should afterwards occur.”⁽¹⁾ His Lordship also pointed out that the further inconvenience would result from the doctrine upheld by the other two judges of the Court, that as the limitation period for such a suit would begin to run from the time when damage was first sustained, whenever appreciable damage had resulted, however limited its extent, a plaintiff would be compelled to bring his action, though he might think the damage not sufficient to make it worth while to enter into litigation, for if he were to wait and not bring his suit till he sustained more serious damage, he would be without redress if that damage, however serious it might be, should occur after the expiry of the prescribed period running from the time when the first damage was sustained. His Lordship made no reference in his judgment to *Nicklin v. Williams* nor to those portions of the judgments in *Bonomi v. Backhouse* which were relied on by his two colleagues, from whom he dissented, as conclusive authority upon the points in question in this case (*Lamb v. Walker*). In the subsequent case of *Darley Main Colliery Co. v. Mitchell*⁽²⁾ the decision of the majority of the judges in *Lamb v. Walker* was overruled, and the view taken by the dissentient judge in that case, COCKBURN, L. C. J., was affirmed by the House of Lords (Lord BLACKBURN dissenting), viz. that for each successive subsidence and consequent damage caused by the same excavation a fresh cause of action arises. The defendants, the Colliery Co., were lessees of coal under the plaintiff's surface land. They worked the coal so as to cause a subsidence of the land and damage to houses thereon in 1868, for which they then made the plaintiff compensation. They worked the coal no more, but in 1882 a further subsi-

(1) L. R., 3 Q. B. D. 405.

(2) L. R., 11 App. Ca. 127; 14 Q. B. D. 125. See also *Crumbie v. Wallsend Local Board*, L. R., (1891) 1 Q. B. 508; *Dwarka Nath Gupto v. Corporation of Calcutta*, I. L. R., 18 Cal. 91.

dence, which would not have occurred if the defendants had left sufficient support under the plaintiff's land, took place, and caused further damage to the houses. The action for damages for the latter damage, brought in 1882, was accordingly held not to be barred by the Statute of Limitations. Lord BRAMWELL, in his judgment, said: "Of course one can see the danger and inconvenience that will follow. This damage accrues many years after the defendants' act or omission which has caused it. If my reasoning is right, many years hence there might be a further action from some further subsidence. But the inconvenience is as great the other way. For if the defendants are right, it follows that on the least subsidence happening, a cause of action accrues once and for all, the Statute of Limitations begins to run, and the person injured must bring his action, and claim and recover for all damage, actual, possible, or contingent for all time."⁽¹⁾ And the rule laid down by the House of Lords in *Darley Main Colliery Co. v. Mitchell*,⁽²⁾ applies to a case in which one and the same excavation (or other removal of support) by the servient owner produces a continuing subsidence and attendant damage of the dominant tenement, as well as to a case where it produces distinct and separate successive subsidences and attendant strokes of damage: in the former case a fresh cause of action arises at each moment of the continuing damage in respect of such damage as is then produced.⁽³⁾

The period of limitation for a suit for damages for subsidence, consequently, runs from the time when the damage is actually sustained: See Limitation Act, 1877, S. 24, and *III. (a)* thereto. This is so, when the right of support infringed is a natural right, as well as when it is an easement.

In a very recent case⁽⁴⁾ the question arose and was decided—for the first time, apparently, as the learned Judge who

(1) L. R., 11 App. Ca. 146, 147.

(2) L. R., 11 App. Ca. 127; 14 Q. B. D. 125.

(3) *Crumbie v. WallSEND Local Board*, L. R., 1891, 1 Q. B. 503.

(4) *Greenwell v. Low Beechburn Coal Co.*, L. R., 1897, 2 Q. B. 165 (decision of BRUCE, J.).

decided it said, with the exception of one unreported case⁽¹⁾—whether a person who is in possession of underground strata, as lessee (or as owner), is liable in damages to the owner of buildings on the surface who has acquired a right to have the buildings uninjured by underground workings,⁽²⁾ for injury occasioned to the buildings, by reason of subsidence happening during the currency of such lessee's lease (or such owner's ownership), caused not by any act of commission on the part of such lessee (or owner) but resulting from an excavation made in the underground strata by such lessee's (or owner's) predecessor in title prior to the date of the lease (or of such owner's acquisition of ownership of the underground strata). It was held that he is not so liable. The learned judge in his judgment, after referring to passages in the judgment of the Master of the Rolls in *Mitchell v. Darley Main Colliery Co.*,⁽³⁾ relied on by the counsel for the owner of the buildings, said: "It is contended that some of the phrases in the judgment I have quoted support the view that the *causa causans* of the second subsidence in *Mitchell v. Darley Main Colliery Co.* was the neglect to fill up the excavation. But I think that the judgment must be read in connection with the facts of the case, and the Master of the Rolls nowhere speaks of the simple neglect to fill up the excavation, or to provide artificial support, as an act of omission of such a character as to give a cause of action. In each case he speaks of the taking away of the support, and the neglect to provide artificial support, as acts which, taken together, operated to cause the subsidence so as to give a right of action. But even if the words can be so construed as to lead to the conclusion that the neglect to provide artificial support of such a character as to prevent the second subsidence was to be regarded as the cause of

(1) L. R., 1897, 2 Q. B. 170.

(2) And, as the learned judge observed, the question would be the same with reference to the natural right of the owner of the surface itself not to have the surface damaged by subsidence: L. R., 1897, 2 Q. B. 171.

(3) L. R., 14 Q. B. D. 125, at pp. 129, 133, 134.

action, it does not follow that, because there is an obligation upon a person who has made an excavation of such a character as will, if left without being artificially filled up, cause successive subsidences in his neighbour's land, to prevent the subsidence by providing artificial support, therefore a similar obligation attaches to a person who is merely in possession of the minerals, and has done no act calculated to cause damage to his neighbour. I do not think any of the expressions in the judgment I have referred to support the contention that where a subsidence causing damage to the surface arises from excavations in mines, a person who has not been concerned in making the excavation, and who happens to be in the possession of the mines before and at the time of the subsidence, is liable for the damage caused by the subsidence simply because he did not take measures to arrest the subsidence."⁽¹⁾ His Lordship also held that the defendants (the lessees of the underground strata) could not be held liable as for allowing a nuisance to continue on their land which had caused damage to the plaintiffs nor upon the principle laid down in *Rylands v. Fletcher*.⁽²⁾⁽³⁾

Injunction to
restrain dis-
turbance.

35. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement—

(a) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this chapter :

(b) if the disturbance is only threatened or intended,—when the act threatened or intended must necessarily, if performed, disturb the easement.

(1) L. R., 1897, at pp. 173, 174.

(2) L. R., 3 H. L. 330.

(3) L. R., 1897, 2 Q. B. at pp. 176—179.

Commentary.

Specific Relief Act, Sections 52—57, are, for convenience of reference, printed in this book as an Appendix (see Appx. VI).

Interference with an easement of light is, ordinarily, a Light. material interference with the use and enjoyment of the dominant house by its occupants, and therefore one for which damages would not be an adequate form of relief,⁽¹⁾ and entitling the aggrieved party to an injunction.

In *Martin v. Price*,⁽²⁾ the defendant, who owned a house opposite to that of the plaintiff, in a street, had pulled down his house and was building one in its place intended to be about 25 feet higher than the old house, and at the time of the institution of the suit part of the front wall of the new house had been erected to a height of nearly 25 feet higher than the old house, but the rest of the new building had not been carried up beyond the height of the old house. The plaintiff sued for a mandatory injunction to pull down the portion which was higher than the old house, and for a prohibitory injunction against continuing to raise the building above the height of the old house. The learned judge who tried the case found that the damage to the plaintiff in respect of his ancient lights from the completed and the intended building, above the height of the defendant's old building, respectively, was and would be substantial, but taking into consideration the fact found, that the obstruction would not interfere with the selling or letting value of the plaintiff's property, the fact that the plaintiff held his house under a lease of which only 29 years were unexpired, and the fact that the plaintiff's house stood on rising ground and close to a large open space from which the rooms affected by the obstruction received a considerable quantity of light, he was of opinion that, under all the circumstances, damages was the proper remedy instead of an injunction, and he

(1) *Attorney-General v. Nichol*, 16 Ves. 338; 10 R. R. 186; Spec. Relief Act, s. 54(c) *Nandkishor Balgovan v. Bhagubhai Pranvalabhdas*, I. L. R., 8 Bom. 95.

(2) L. R., 1894, 1 Ch. 276.

awarded damages, instead of an injunction, as well in respect of the completed obstruction as in respect of the threatened obstruction. The Court of Appeal, while holding the plaintiff entitled to damages only in respect of the portion of the obstructive building already completed, held, overruling the Court of first instance, that the plaintiff was entitled to a prohibitory injunction as to the threatened portion. They said, in their judgment, "The learned judge found as facts that some of the plaintiff's lights were ancient, and that they were already obstructed to a substantial extent, and would be still further obstructed. He found that the plaintiff had sustained, and would sustain, material injury, entitling him to substantial damages. We see no reason to differ from him on these matters of fact. The plaintiff's legal right, and its infringement already, and threatened further infringement, to a material extent, being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the Court is in the habit of acting in these cases. There might, of course, be circumstances depriving the plaintiff of this *prima facie* right; but we can discover none in this case." (1)

Where the effect of the defendant's building, in respect of which, as obstructive to the light to which the plaintiff is entitled, an injunction is sued for, would be to render the plaintiff's property useless, an injunction will be granted, (2) for if damages only were awarded, they would necessarily be equal to the whole value of the property and the Court would practically be compelling the plaintiff to sell his property to the defendant against his will. In *Holland v. Worley* (3) PEARSON, J., divided cases into those in which "the defendant is doing an act which will render the plaintiff's property absolutely useless to him unless it is stopped," and those "where the injury to the plaintiff would be less serious,

(1) L. R., 1894, 1 Ch. 285.

(2) *Aynsley v. Glover*, L. R., 18 Eq. 544; *Smith v. Smith*, L. R., 20 Eq. 500; *Kreht v. Burrell*, L. R., 7 Ch. D. 551; (all three decisions of JESSEL, M. R.).

(3) L. R., 26 Ch. D. 578.

where the Court considers that the property may still remain the plaintiff's and be substantially useful to him." In the former cases the Court should not, he thought, award damages instead of an injunction, which would be equivalent to compelling the plaintiff to sell his property to the defendant. But in the latter class of cases he was of opinion that "the Court, if it thinks right, may exercise the discretion given it by the Act" (i.e. the Act known as Lord Cairns's Act,⁽¹⁾ by which discretionary power was given to the Court, in cases in which it has power to grant an injunction, to award damages in lieu of an injunction). And in the case before him, considering the fact that if the defendant's buildings were allowed to go on the injury to the plaintiff would not be so great as to render the property useless to him, though it was such as to reduce to an appreciable extent the selling value of the property, and considering also the situation of the property "in the heart of a great city like London," he was of opinion that he would be exercising his discretion rightly by awarding the plaintiff damages instead of granting him an injunction.⁽²⁾ The judgment of PEARSON, J., in this case, if it meant, as it might be taken to mean, to lay down a rule that in all cases in which the damage to the plaintiff falls short of making his building useless, the Court may, if it thinks fit, award money compensation instead of an injunction, has not been approved of in subsequent decisions.⁽³⁾ In *Martin v. Price*, KEKEWICH, J., after expressing his dissent from PEARSON, J., if he intended to lay down such a rule, said: "There are numerous cases constantly occurring in which the injury to the plaintiff is far less than supposed in the first class [referring to PEARSON, J.'s classification], and in which, as I understand the doctrine and practice of the Court, an injunction goes as a matter of course."⁽⁴⁾ And the true rule, which should govern the exercise of the Court's

(1) 21 & 22 Vict., c. 27.

(2) L. R., 26 Ch. D. 583, 587.

(3) See *Greenwood v. Hornsey*, L. R., 33 Ch. D. 476; *Martin v. Price*, L. R., 1894, 1 Ch. 276, 280.

(4) L. R., 1894, 1 Ch. at p. 280.

discretion, appears to be indicated by the following passage in the judgment of the Court of Appeal in *Martin v. Price*: "The plaintiff's legal right, and its infringement already, and threatened further infringement, to a material extent, being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the Court is in the habit of acting in these cases. There might, of course, be circumstances depriving the plaintiff of this *prima facie* right; but we can discover none in this case."⁽¹⁾ The same rule would seem to hold good, as a guide to the discretion of the Court, under this Act: when the damage is "*substantial*," so that compensation would be recoverable under S. 33, an injunction should, it is submitted, ordinarily be granted, subject to the provisions of the Specific Relief Act, *i.e.* provided there are no special circumstances, such as, *e.g.*, laches on the plaintiff's part, disentitling him to such relief, or rendering damages equally efficacious or adequate relief.

In *Shelfer v. City of London Electric Lighting Co.*,⁽²⁾ which was a case of nuisance by vibration and noise, and in which the Court of Appeal considered and decided how the jurisdiction given by Lord Cairns's Act, S. 2, ought to be exercised, SMITH, L. J., said, in his judgment: "Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction. There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for

(1) L. R., 1894, 1 Ch. at p. 285.

(2) L. R., 1895, 1 Ch. 287, 322, 323,

an injunction as authorized by this section. In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out. In my opinion, it may be stated as a good working rule that (1) if the injury to the plaintiff's legal rights is small, (2) and is one which is capable of being estimated in money, (3) and is one which can be adequately compensated by a small money payment, (4) and the case is one in which it would be oppressive to the defendant to grant an injunction:—then damages in substitution for an injunction may be given. There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction. It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. For instance, an injury to the plaintiff's legal right to light to a window in a cottage represented by £15 might well be held to be not small but considerable; whereas a similar injury to a warehouse or other large building represented by ten times that amount might be held to be inconsiderable. Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception."

Under the Indian law, the question whether, with reference to the injury done or threatened to be done by an invasion

or intended invasion of a plaintiff's right to light, an injunction or damages is the proper relief, so far as it is a question of law, and not of fact, turns mainly upon the sense in which sub-section(c) of Sec. 54, Specific Relief Act, "where the invasion is such that pecuniary compensation would not afford adequate relief," is understood. In *Dhunjibhoy Cowasji v. Lisboa*,⁽¹⁾ a Bombay case decided (in 1888) before the Easements Act came into force in Bombay, in which the plaintiff sued for an injunction, or, in the alternative, damages, and in which it was admitted by the defendant that the buildings in course of erection by him, and the erection of which the plaintiff sought to restrain, would, if erected, "largely diminish the amount of light" which theretofore had passed through the plaintiff's ancient windows in question in the suit into the plaintiff's house, SARGENT, C.J., in the judgment of the Court⁽²⁾ delivered by him, referred to some of the leading English decisions, shewing how the jurisdiction of the Courts of Equity in England has been exercised, before and after the passing of Lord Cairns's Act,⁽³⁾ in granting or declining to grant injunctions in suits for invasion of rights to light. He cited (*inter alia*) Sir G. JESSEL, M. R.,'s statement, in *Aynsley v. Glover*,⁽⁴⁾ of the rule, as understood by him, by which, since the passing of Lord Cairns's Act, the English Courts of Equity should be guided in the exercise of their discretion, *viz.* "that wherever an action can be maintained at law and really substantial damages, or perhaps I should say considerable damages (for some people may say that £20 is substantial damages), can be recovered at law, there the injunction ought to follow in equity; generally, not universally." He then referred to the decision of PEARSON, J., in *Holland v. Worley*,⁽⁵⁾ in which that learned judge, after referring to the decisions of Sir G. JESSEL, M. R., in *Aynsley v. Glover*,⁽⁵⁾

(1) I. L. R., 13 Bom., 252.

(2) SARGENT, C.J., and BAYLEY, J.

(3) 21 & 22 Vict., c. 27.

(4) L. R., 18 Eq. 544, at p. 553.

(5) L. R., 26 Ch. D. 578.

Krehl v. Burrell⁽¹⁾ and *Smith v. Smith*⁽²⁾, said: "It seems to me that no settled rule is laid down, or even suggested, by the Master of the Rolls, but he leaves it, where the Act leaves it, as a matter of discretion, to be exercised in such a way as the Court, under the circumstances of each case, shall think right. But I do not think that I shall be misinterpreting the Master of the Rolls, if I say that his opinion (in which I heartily concur) seems to me to be this, that, if the defendant is doing an act which will render the plaintiff's property absolutely useless to him unless it is stopped, in such a case, inasmuch as the only compensation which could be given to the plaintiff would be to compel the defendant to purchase his property out and out, the Court will not, in the exercise of the discretion given it by Lord Cairns's Act, compel the plaintiff to sell his property to the defendant. But in other cases, where the injury to the plaintiff would be less serious, where the Court considers that the property may still remain the plaintiff's and be substantially useful to him, as it was before, and the injury, therefore, is one of a nature that can (without taking away the plaintiff's property from him) be compensated by money, then the Court, if it thinks right, may exercise the discretion given it by the Act. Now, looking at all the circumstances of this case, I come to the conclusion that, although if the defendant's buildings are allowed to go on there will be some injury done to the plaintiff, the injury will not be so great as to render the property useless to him, even for the purpose for which it is employed at the present moment. And looking at the nature of the property, and considering its situation in the heart of a great city like London, I think I shall not be doing wrong if, instead of granting an injunction, I exercise my discretion by giving the plaintiff damages."⁽³⁾ Sir C. SARGENT then went on to say, of *Holland v. Worley*: "This case has been referred to in terms of implied disapproval by BACON, V. C.,

(1) L. R., 7 Ch. D. 551; 11 Ch. D. 146.

(2) L. R., 20 Eq. 500.

(3) L. R., 26 Ch. D., at pp. 586, 587.

in *Greenwood v. Hornsey*,⁽¹⁾ and it may be that Mr. Justice PEARSON's ruling, which undoubtedly modified the generally received practice of the Court of Equity, may not be followed in England." The Chief Justice then proceeded: "The question, however, whether damages are a sufficient compensation does not, we think, present itself to the Courts of this country in precisely the same manner and form as it does to a Court of Equity in England. This latter Court in awarding damages under Lord Cairns's Act exercises a discretionary power in departing from the specific relief which it had hitherto exclusively afforded; and could scarcely be expected to take so broad a view of the subject as the Courts of this country whose "duty" it is under the Specific Relief Act not to grant an injunction where damages afford adequate compensation. The result has been that this Court has in several cases adopted the view taken by PEARSON, J., as being one which if applied with caution is suited to the circumstances of this city, which from its nature can in most parts of it only extend itself vertically upwards; and we think, therefore, that it ought to be considered as the general practice of this Court, although doubtless one to be administered with much care and with due regard to the special circumstances of each case." The judgment then reviews the evidence, finds that, as to one of the windows in question, a great diminution of the light coming through it would be caused by the obstruction complained of, but that having regard to the light which it would still receive through other windows, it was "impossible to say that there was a material diminution of comfort in the use of the room"; and as to the other windows which were in question, one of which opened upon a staircase, and the other two of which belonged to a loft used as a lumber-room but frequently used as a bedroom, finds that the plaintiff's comfort in the use of the staircase and loft would not be materially interfered with by the defendant's proposed building; and refuses an injunction,

(1) L. R., 33 Ch. D. 471, at p. 476:

but holds the plaintiff entitled to substantial damages and awards him Rs. 2,000 damages.

In *Ghanasham Nilkant v. Moroba Ramchandra* (1) FARRAN, J., said: "The Specific Relief Act (I of 1877), Sec. 54, enacts that when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, the Court *may* grant a perpetual injunction in the following case:—(c) when the invasion is such that pecuniary compensation would not afford adequate relief. (I omit clauses (a), (b), (d), and (e) as not specially applicable to the present circumstances.) The Court has under that section jurisdiction to grant an injunction only in those cases where pecuniary compensation would not afford adequate relief. The expression 'adequate relief' is not defined, but it is probably used in the sense in which KINDERSLEY, V. C., uses it in *Wood v. Sutcliffe* (2) as meaning 'such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before.' If that be the correct meaning of the phrase, it is, I think, difficult to predicate of any material obstruction to ancient light that pecuniary compensation for it would in effect place the plaintiff in the same position as before, and more particularly so where the light is obstructed in a house in which a man is himself residing." "It does not, however, follow," continued the learned judge, "that in such cases a plaintiff is entitled as of right to an injunction. Under the Specific Relief Act the Courts are given a discretion to grant or withhold an injunction, as in England they have a discretionary power to award damages in lieu of an injunction. In this view of the law, the Court has to consider in each case not merely whether the plaintiff's legal right has been infringed, or even materially infringed, but also whether under all the circumstances of the case he ought to be granted an injunction as the proper and appropriate remedy for such infringement. Two principles are, I think, deducible from the English cases, which may be deemed

(1) I. L. R., 18 Bom. 474, at pp. 487, 488.

(2) 21 L. J., (Ch.) at p. 255.

binding upon our Courts : (1) that Courts ought not to interfere by way of injunction when obstruction of light is very slight and where the injury sustained is trifling, except in rare and exceptional cases—*Dent v. Auction Mart Co.*(1) ; *Hers v. Union Bank of London*(2) ; Goddard on Easements, p. 438 ; and (2) that where ‘the defendant is doing an act which will render the plaintiff’s property absolutely useless to him unless it is stopped, in such a case, inasmuch as the only compensation, which could be given to the plaintiff, would be to compel the defendant to purchase his property out and out, the Court will not, in the exercise of its discretion, compel the plaintiff to sell his property to the defendant’ by refusing to grant him an injunction and awarding him damages on that basis (see *Holland v. Worley*(3)). Between these two extremes, where the injury to the plaintiff would be less serious, where the Court considers the property may still remain with the plaintiff and be substantially useful to him as it was before, and where the injury is one of a nature that can be compensated by money, the Courts are vested with a discretion to withhold or grant an injunction, having regard to all the circumstances of the particular case before them, including the fact that the premises are situated in a city, like this, where land suitable for building is limited and very valuable, and where property owners should, so far as possible, consistently with the existing rights of their neighbours be allowed to utilize it to the utmost extent.”(4) The conclusion come to by the Court,(5) in that case, upon the facts was summed up, in the judgment of SARGENT, C. J., thus : “On the whole I do not think, although the light has been sensibly diminished, that there has been such a ‘large, material and substantial damage,’ to use the language of Sir G. JESSEL in *Aynsley v. Glover*, as to require interference by injunction, or that the room, although the light has been sensibly diminished, has been rendered unfit for the purpose for which it may reason-

(1) L. R., 2 Eq. 238.

(3) L. R., 26 Ch. D. 578.

(2) 2 Giff., p. 686.

(4) I. L. R., 18 Bom. at pp. 488, 489.

(5) SARGENT, C. J., & FARRAN, J.

ably be expected to be used. The above remarks apply with even greater force to the other windows. As to the amount of damages, we do not think the Rs. 200 paid in by defendant is sufficient, and that, having regard to the evidence in the case, they should not be less than Rs. 500.”⁽¹⁾

The standard held by the Bombay decisions to be the right one, in respect of the extent or amount of injury which the plaintiff in a suit for an injunction, for an invasion, effected or threatened, of his right to light, must prove that he has sustained or would sustain (as the case may be) by such invasion, in order to make out that damages would not afford him adequate relief, and to entitle him to an injunction, is, evidently—at least, as to cases arising within the town of Bombay—a different one from the standard established by the English decisions as the one to be observed by the Courts in England in determining the question, in such suits, whether an injunction should be granted or not: according to the former an injunction would be refused in many cases in which according to the latter standard it would be granted. In *Sultan Nawaz Jung v. Rustomji Nanabhoy*⁽²⁾ the Bombay High Court held, following *Dhunjibhoy v. Lisboa* and *Ghanasham Nilkant v. Moroba*, that the plaintiff was not entitled to an injunction, in respect of the invasion of his right to light in question, assuming that he had acquired such right,⁽³⁾ although they found that he was entitled to recover damages to such a large amount as Rs. 7,000. The Court said, in their judgment, referring to Sec. 54 of the Specific Relief Act: “To Courts subject to that Act the English decisions cited have no application,” [*Martin v. Price*,⁽⁴⁾ *Shelfer v. City of London Electric Lighting Co.*,⁽⁵⁾ and other English cases, were cited]. No doubt, as remarked by SMITH, L. J., in *Shelfer v. City of London Electric Lighting Co.*,⁽⁶⁾ the question

(1) I. L. R., 18 Bom. at p. 485.

(2) I. L. R., 20 Bom. 704.

(3) The Court, however, held that he had not acquired the right to light claimed; and, strictly, the decision on the question what relief he would have been entitled to was, therefore, *obiter*.

(4) L. R., 1894, 1 Ch. 276.

(5) L. R., 1895, 1 Ch. 287.

(6) See above, page 229.

whether the amount of money estimated to represent the damage to the plaintiff from the injury is adequate compensation is, in each case, a relative one—relative to the value of the dominant building, or the portion of it affected by the obstruction. But, though the value of the plaintiff's house is not stated in the report of the Bombay case last referred to, it seems improbable that relatively to its value, whatever it might have been, a sum of Rs. 7,000 could be regarded as an inconsiderable sum or such as that, if the principle followed by the Courts in England had been applicable, the plaintiff could have been held not to be entitled to an injunction, but only to damages.

But where the effect of the defendant's building, obstructing the light to the plaintiff's ancient window, was to render the room to which it belonged so dark that it was impossible to see sufficiently even "to walk about or do anything in it," the Bombay High Court held the plaintiff entitled to an injunction.⁽¹⁾ So, the complete darkening of some of the plaintiff's principal rooms was held to be an injury which could not be adequately redressed by damages and which entitled him to an injunction.⁽²⁾ In *Yaro v. Sana-ullah*⁽³⁾ the plaintiff, who carried on the business of a manufacturer of a particular kind of cloth in his house in the city of Benares, was entitled to a prescriptive right to light to the windows of his house. The defendant proceeded to rebuild the wall of his house in such manner as to "have the effect practically of reducing the plaintiff's light to such an extent that he could not carry on his business." The Allahabad High Court confirmed the decree of the lower appellate Court granting a mandatory injunction. The Court said, in their judgment: "It is said in appeal here that the lower appellate Court had no jurisdiction to grant an injunction because it could have awarded damages; and the decision in *Dhunjibhoj Cowasji*

(1) *Kadarbhai v. Rahimbhai*, I. L. R., 13 Bom. 674.

(2) *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom. 188, 186.

(3) I. L. R., 19 All. 259.

Umrigar v. Lisboa⁽¹⁾ and *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*⁽²⁾ were relied on. In our opinion the rule of law in such cases was correctly laid down by Sir GEORGE JESSEL in *Aynsley v. Glover*⁽³⁾ and by the late Mr. Justice PEARSON in *Holland v. Worley*.⁽⁴⁾ In our opinion it was never intended by the Legislature that a man should not get an injunction unless his property would be practically destroyed if the injunction were not granted. Here there was substantial injury and wrongful injury to the plaintiff's rights. The plaintiff was entitled to the injunction which he got."

It has been held that there is no difference between houses in towns and houses in the country, in respect of the right of the owner or occupier to protection by injunction against an obstruction to the access of light or air ⁽⁵⁾.

The Courts have discretionary power to grant not only a prohibitory injunction, restraining the defendant from proceeding with the building, but also a mandatory injunction, ordering him to pull down the building, or so much of it as has been erected (as the case may be).⁽⁶⁾ Such mandatory injunction is not granted if the plaintiff has allowed the building to be erected without complaint, if, at least, the building is of a permanent character and costly;⁽⁷⁾ in such a case he would come within the principles of the Specific Relief Act, disentitling him on the ground of acquiescence,

Mandatory
injunctions.

(1) I. L. R., 13 Bom. 252.

(2) I. L. R., 13 Bom. 474.

(3) L. R., 18 Eq. 544.

(4) L. R., 26 Ch. D. 578, 585.

(5) *Dent v. Auction Mart Co.*, L. R., 2 Eq. 338, 248, 249; *Martin v. Headon*, L. R., 2 Eq. 425, 429, 430.

(6) Spec. Relief Act, s. 55, and *Illustration(a)* thereto: See Appendix VI; *Nandkishor Balgovan v. Bhugubhai Pranvalabhdas*, I. L. R., 8 Bom. 95; *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom. 138.

(7) *Baxter v. Bower*, 44 L. J. (N. S.) Ch. 625; *Durell v. Pritchard*, L. R., 1 Ch. 244; *Abdul Rahman v. Emile*, I. L. R., 16 All. 69, 72; *Martin v. Price*, L. R., 1894, 1 Ch. 276. Cases in which plaintiff gave notice to defendant protesting against the building, and a mandatory injunction was therefore granted, are *Bottlewalla v. Bottlewalla*, 8 Bom. H. C. R., O. O. 181; *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom. 138.

and of his conduct.⁽¹⁾ Where, however, the building was a shed, the removal of which would be very little more than taking down a hoarding, a mandatory injunction, ordering its removal, was granted, notwithstanding that the plaintiffs had allowed the shed to be completely built without making any complaint during the building of it nor till several months after its completion.⁽²⁾ But mere complaint, made by the plaintiff when the defendant commenced to erect the building obstructing the plaintiff's lights, without taking legal action, may not be sufficient to entitle the plaintiff to a mandatory injunction. In *Ghanasham Nilkant v. Moroba*,⁽³⁾ FARRAN, J., said: "Section 55 of the Specific Relief Act in express terms makes this exercise of our mandatory power discretionary. The plaintiff complained of the defendant's buildings as soon as the latter began to build; but though he could readily have seen the defendant's building plans, took no legal steps to restrain his building until the ground and first floors had been completed. Prompt action is very essential in these cases, if an injunction is the desired remedy." If the plaintiff acquiesced in the construction of the building upon the faith of false representations made to him by the defendant, that the building would not have the effect of interfering with his right to light, acquiescence under such circumstances will be no bar to his obtaining this relief.⁽⁴⁾ And delay on the plaintiff's part in instituting his suit for an injunction may be consistent with non-acquiescence, and does not necessarily disentitle him to this relief.⁽⁵⁾

The fact that the defendant will suffer more by the demolition of his building than the plaintiff would suffer if he were awarded a money compensation and the defendant allowed to retain his building obstructing the light to plaintiff's

(1) Spec. Relief Act, s. 56, (h) and (j). See Appendix VI. And see *Beni Madhab Das v. Ramjay Rokh*, 1 Beng. L. R., App. Civ., 213; 10 Suth. W. R., Civ. R. 316.

(2) *Baxter v. Bower*, 44 L. J. (N. S.), Ch. 625.

(3) 1 L. R., 18 Bom. 474, at p. 492.

(4) *Davies v. Marshall*, 10 C. B., N. S. 697.

(5) *Jamnadas Shankarlal v. Atmaram Harjivan*, 1 L. R., 2 Bom. 133, 137.

windows, is, except under special circumstances,⁽¹⁾ no ground for refusing the plaintiff the mandatory injunction to which he is otherwise entitled.⁽²⁾ To refuse the plaintiff such injunction, and limit him to relief by way of damages, would be to put it in the power of the servient owner to erect buildings obstructing the light to the dominant owner's windows in defiance of the right and of the protests of the latter, and practically to buy out the dominant owner.⁽³⁾

An injunction in a case of light or air, if mandatory, should only order the demolition of so much of the servient owner's building as interferes with the access of light to which the dominant owner is entitled, and, if prohibitory, should only restrain him from erecting or continuing any building so far as it would cause such interference.⁽⁴⁾

By the English law the dominant owner can obtain an injunction to restrain interference with his easement of light if he can shew that there is a material interference with the amount of light to which he is entitled, notwithstanding that the obstruction has not materially affected him in the use to which he has as yet put the light. The defendant must show that for whatever purpose the plaintiff might wish to employ the light there would be no material interference with it; otherwise the plaintiff will be entitled to an injunction.⁽⁵⁾ From this section, taken in conjunction with Sec. 33, *Explanation II*, it appears that under this Act an injunction could not be granted unless the plaintiff was affected, by the obstruction, in respect of the use to which he had already put the light, and that the Court could not take into consideration possible future purposes for which it might be employed.

(1) as in *Senior v. Pawson*, L. R., 3 Eq. 330.

(2) *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom. 133, 139.

(3) See observations of Wood, V. C., in *Dent v. Auction Mart Co.*, L. R., 2 Eq. at p. 246, and of JESSEL, M. R., in *Aynsley v. Glover*, L. R. 18 Eq. at p. 552.

(4) *Bala v. Maharaj*, I. L. R., 20 Bom. 788.

(5) *Aynsley v. Glover*, L. R., 18 Eq. 544, 549; *Yates v. Jack*, L. R., 1 Ch. 295, 298, overruling *Jackson v. Duke of Newcastle*, 3 De G. J. & S. 275. So also held (at least as to all ordinary possible purposes) in *Bottlewalla v. Bottlewalla*, 8 Bom. H. C. R., O. C. 181, 193.

There is no conclusive rule as to the height to which a building on the servient owner's land may be erected without materially affecting the dominant owner's right to light ; but it has been held that if the height of the building does not exceed the distance from the window in question in a horizontal line to the building, or, in other words, if the building does not exceed such a height as admits of light falling on the window at an angle of forty-five degrees, then, under ordinary circumstances, the building causes no material obstruction to the light to the window.⁽¹⁾ On this principle it had been enacted, in the general regulations, in certain Building Acts, that the houses in streets should not exceed in height the breadth of the street. But the fact that forty-five degrees of sky are left unobstructed is by no means conclusive but is only "*prima facie* evidence that there is not likely to be material injury ; evidence," however, " which requires to be rebutted by direct evidence of injury, and not by the mere exhibition of models."⁽²⁾ If the whole of the evidence, in any particular case, shows that the light to the plaintiff's windows has been materially affected, by the defendant's building, the fact that the forty-five degrees limit is not exceeded by that building, will be no defence.⁽³⁾ In the *Delhi & London Bank Ltd. v. Hem Lall Dutt*⁽⁴⁾ TREVELYAN, J., in his judgment said, of the forty-five degree rule : " This, it is true, is not a positive rule of law, but it is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory. Of course, when lights are closed up by high buildings at the sides, this rule may not be applicable, but here there is no circumstance of that kind ; " and, finding that no substantial diminution of the light to the plaintiff's windows was caused by the defendant's building, he was of opinion that he could fairly apply the rule to the case.

(1) *Beadel v. Ferry*, L. R., 3 Eq. 465.

(2) *Per* Lord SELBORNE, L. C., in *City of London Brewery Co. v. Tennant*, L. R., 9 Ch. App. 212, 220.

(3) *Theed v. Debenham*, L. R., 2 Ch. D. 165.

(4) I. L. R., 14 Cal. 839, 854, 855.

See also notes to Sec. 33, as to rights to light and air.

Where the Court was not satisfied from the evidence adduced, whether the wall proposed to be built by the defendant, and which the plaintiff sought to restrain him from building, would be a material obstruction to the plaintiff's lights, the Court adopted the expedient of directing a screen to be erected to the height of the proposed wall, and appointing a surveyor to report on the effect of it.⁽¹⁾

In a suit for an injunction to restrain the defendants, who owned land adjoining the plaintiff's land, from continuing an excavation which they were making in their land close to the line of adjunction of the two properties, and from which, if continued, the plaintiff apprehended damage by subsidence to her land,⁽²⁾ a Division Bench of the High Court of Calcutta⁽³⁾ held that, under S. 54 of the Specific Relief Act, the plaintiff was entitled to an injunction, though no damage had been actually sustained up to the time of the institution of the suit, if the facts proved shewed that such subsidence and damage would be the inevitable result of a continuance, threatened by the defendants, of the excavation. The Court referred to Illustration (r) to Section 54 of the Specific Relief Act and to *Pattisson v. Gilford*,⁽⁴⁾ in support of its decision, and, in reference to that case, said: "The facts of that case had, it is true, no analogy to the present case, but still the Master of the Rolls was dealing with the principle upon which relief is given against a threatened wrong, and the case is, we think, an authority that such a suit will lie when the threatened act is of such a character that it must *inevitably* result in injury—inevitably in the sense in which the Master of the Rolls says he uses the word, that is to say not in the sense of there being no possibility the other way, because Courts of Justice must always act upon the theory of very great probability being sufficient, but in the sense that there must

Injunction to restrain threatened removal of support.

(1) *Leech v. Schweder*, L. R., 9 Ch. App. 463, 471.

(2) *Hindu Basini Chowdhurani v. Jahnnabi Chowdhurani*, I. L. R., 24 Cal. 260.

(3) *MACPHERSON and HILL*, JJ.

(4) L. R., 18 Eq. 259.

be such a great probability, that, in the view of ordinary men, using ordinary sense, the injury would follow." This was a case of natural right to support, but the principle of the decision applies also to a case of an easement of support.

Limited injunction.

Where the plaintiff was a tenant from year to year of the dominant tenement, and was held to be entitled to the injunction to restrain disturbance of his easement for which he sued, the Court⁽¹⁾ held that "the injunction must not be perpetual, but limited to the period of the continuance of the plaintiff's tenancy."⁽²⁾

Effect of covenant for quiet enjoyment.

It has been held by the Bombay High Court that where the defendant has entered into a covenant for quiet enjoyment by the plaintiff of his tenement, the Court will, where the building complained of obstructs, or, if erected, would obstruct the light or the air to which the plaintiff is entitled, compel the defendant to perform his covenant (by abstaining from building, or pulling down the obstructive building, as the case may be), without enquiring into the nature and extent of the interference.⁽³⁾

Injunction and compensation in same suit.

In the same suit an injunction may be obtainable as well as damages for the loss already incurred from the disturbance.⁽⁴⁾

Whether compensation in lieu of injunction awardable for intended injury.

The question whether, where a prohibitory injunction is refused, the Court has jurisdiction to award damages for damage not yet sustained but which will result to the plaintiff from the act intended to be done by the defendant, as e.g., in a case of right to light, from the erection of the building intended to be erected by the defendant, is, under the English law, still an unsettled question.⁽⁵⁾ The provision

(1) Sir W. PAGE WOOD, V. C.

(2) *Simper v. Foley*, 2 John. & Hem. 555, 564.

(3) *Bottlewalla v. Bottlewalla*, 8 Bom. H. C. R., O. C. 181, 194. But see *Leech v. Schweder*, L. R., 9 Ch. App. 463.

(4) *Abdul Hakim v. Gonesh Dutt*, I. L. R., 12 Cal. 323; *Jumnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom. 133.

(5) See *Martin v. Price*, L. R., 1894, 1 Ch. 284; *Dreyfus v. Peruvian Guano Co.*, L. R., 43 Ch. D. 316, 333, 342; *Holland v. Worley*, L. R., 23 Ch. D. 578.

in S. 33 that the damage must have been actually caused seems to shew that in cases governed by this Act a Court has not such a power. In *Ghanesham Nilkant Nadkarni v. Moroba Ramchandra Pai*,⁽¹⁾ FARRAN, J., said: "Even now it is an open question [his Lordship was referring to the English law] whether damages in lieu of an injunction can be awarded by way of compensation for an injury not yet committed, but only threatened and intended—*Martin v. Price*.⁽²⁾ Section 33 of the Easements Act lays down for us the law as to the case in which damages or compensation can be awarded, and sets that question at rest."⁽³⁾ In a Bombay case of 1887, and therefore not governed by this Act, the High Court awarded damages, in lieu of an injunction, for future damage, to be sustained by defendant's intended building.⁽⁴⁾

In a case of an easement of light where a mandatory injunction was granted directing the defendant to pull down so much of his house as obstructed the light to which the plaintiff was found to be entitled, the High Court directed the lower Court, in executing the decree, to employ a professional man, agreed on by the parties if they could agree, but if not, then one nominated by itself, to determine what demolition was necessary to give effect to the decree in the way least injurious to the defendant.⁽⁵⁾

Mode of executing a mandatory injunction.

Where an injunction restraining the defendants from building so as to obstruct the light and air to the plaintiff's windows had been disobeyed, the High Court ordered the committal of the defendants, although the wall, the construction of which was adjudged by the Court to have been a breach of the injunction, had been erected by them in accordance with the advice of a skilled surveyor, who stated in an affidavit that the wall would not materially affect the access of the

Enforcement of injunction disobeyed.

(1) I. L. R., 18 Bom., 474, (a suit of 1892).

(2) L. R., 1894, 1 Ch. 276.

(3) I. L. R., 18 Bom., at p. 487.

(4) *Dhunjibhoy Cowasji v. Lisboa*, I. L. R., 13 Bom., 252. So did PEARSON, J., in *Holland v. Worley*, L. R., 26 Ch. D. 578.

(5) *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom. 133, 139.

light to plaintiff's windows and would increase rather than diminish the access of air thereto.⁽¹⁾

As to interim or interlocutory injunctions, see Civ. Pro. Code, Ch. XXXV; *Newson v. Pender*; ⁽²⁾ *Bottlewalla v. Bottlewalla*.⁽³⁾

Interlocutory
mandatory
injunctions.

The defendant in an action to restrain him from building so as to darken the plaintiff's lights, upon receiving notice of motion for injunction, set a large number of men to work, and by working night and day ran up his wall to a height of nearly 40 feet before receiving notice that an *ex parte* interim injunction had been granted. It appeared to be a question of some nicety whether the lights were ancient lights. On the motion coming on, STIRLING, J., restrained the defendant from further building, and from permitting the wall which he had erected to remain. It was held, on appeal, that this order was right, as the defendant had endeavoured to anticipate the action of the Court by hurrying on his building, and that what he had erected ought therefore to be at once pulled down, without regard to the ultimate result of the action.⁽⁴⁾ In *Von Joel v. Hornsey*⁽⁵⁾ the plaintiff warned the defendant that if he built his house to such a height as to interfere with the ancient lights of the plaintiff's house, he would bring an action to restrain him. No promise on the defendant's part not to so build having been given, the plaintiff on the next day instituted his suit. The defendant evaded service of the writ for several days and in the meantime proceeded with his building till substituted service on him was effected. It was held by the Court of Appeal, affirming the decision of KEKEWICH J., that the

(1) *Pranjivandas Harjivandas v. Mayaram Samaldas*, 1 Bom. H. C. R., O. C. 148. As to the practice in England in cases of contempt by non-obedience to an injunction, see "The Annual Practice," under titles 'Attachment,' 'Committal,' 'Sequestration.' See also judgment of CORON, L. J., in *Parker v. First Avenue Hotel Co.*, L. R., 24 Ch. D. at p. 288. As to the procedure in India in case of non-obedience to an injunction, see Civ. Pro. Code, S. 260.

(2) L. R., 27 Ch. D. 43.

(3) 8 Bom. H. C. R., O. C., 181, at p. 184.

(4) *Daniel v. Ferguson*, L. R., 1891, 2 Ch. 27.

(5) L. R., 1895, 2 Ch. 774.

case was within the principle which was acted upon in *Daniel v. Ferguson*, and that the plaintiff was entitled to an interlocutory mandatory injunction, ordering the defendant to pull down so much of his building as he had erected after being warned by the plaintiff as above mentioned.

36. Notwithstanding the provisions of section twenty-four, the dominant owner cannot himself abate a wrongful obstruction of an easement.

Abatement of
obstruction of
easement.

Commentary.

Abatement of an obstruction to an easement is allowed, within certain limits, by the law of England, but, as being likely to lead to a breach of the peace, is not favored by that law⁽¹⁾. In a Bengal case it was held that the defendants, who were found to have an easement of passage over a lane, of the soil of which the plaintiffs claimed to be, but were found not to be, the owners, had a right to pull down a wall which had been erected by the plaintiffs on the lane to exclude the defendants from it.⁽²⁾

To prevent breaches of the peace, Magistrates of the first class are empowered by the Criminal Procedure Code,⁽³⁾ where a dispute as to an easement occurs and is likely to cause a breach of the peace, to make an order either permitting or prohibiting the doing of the act which is in question, until the question between the parties is settled by the decision of the Civil Court.

(1) *Arnold v. Jefferson*, Holt. 498; *Rex v. Roswell*, 2 Salk. 459; *Rex v. Wharton*, Holt. 499; *Hyde v. Graham*, 1 H. & C. 598. A commoner can abate an obstruction which prevents his enjoying the right of common altogether, but not an obstruction which merely abridges or partially prevents such enjoyment. *Sadgrove v. Kirby*, 2 T. R., 483; 1 B. & P. 13; 3 B. R. 239; *Cooper v. Marshall*, 1 Burr. 259.

(2) *Chunder Oomarr Mukerjee v. Koylash Chunder Sett*, I. L. R., 7 Cal. 665, 673.

(3) S. 147. See Appendix VII.

CHAPTER V.

THE EXTINCTION, SUSPENSION AND REVIVAL OF
EASEMENTS.—
Commentary.

Extinction by
legislative
enactment.

A mode of extinction of easements not mentioned in this Act, is extinction by legislative enactment, which may be express,⁽¹⁾ or implied.⁽²⁾ In a case under a Statute authorizing compulsory purchase of lands for certain purposes, and providing that all rights and easements in or relating to lands so purchased shall be extinguished, it was held that, on such a purchase, not only actually existing and completed rights, but also inchoate rights or easements, were extinguished, so that, *e.g.*, if the owner of a house adjoining land so purchased had for ten years up to the date of the purchase enjoyed access of light to his house over the land purchased under such circumstances that if he had continued so to enjoy it he would, but for the purchase, have acquired, on the completion of the statutory period, a prescriptive right to the light, such inchoate right would be extinguished by the purchase.⁽³⁾ By the Land Acquisition Act VI of 1857 (repealed), Sec. 8, it was provided that when the Collector had, in due course, taken possession of the land required, the land "shall thenceforward vest absolutely in the Government, free from all other estates, rights, titles and interests;" and under that Act, where a Railway Co. had, with the aid of the Government, acquired land of the plaintiff's mouza necessary for their railway where it intersected the mouza, and the line of the railway was carried between that part of the mouza where the ryots of the mouza dwelt and that part of it where their fields were situate, it was held that the right of way from their dwellings to their

(1) *E.g.*, 38 & 39 Vic., c. 36, s. 20.

(2) *Corporation of Yarmouth v. Simmons*, L. R., 10 Ch. D. 518.

(3) *Barlow v. Ross*, L. R., 24, Q. B. D. 381.

fields which the plaintiff and his ryots had before the land was acquired under the Act, was extinguished by Sec. 8 of the Act, though it was found that they had no mode of access to their lands except by crossing the line.⁽¹⁾ The Land Acquisition Act of 1870, which was repealed by the Land Acquisition Act, I of 1894, now in force, provided (in Secs. 16, 17) that the land intended to be acquired, when taken possession of by the Collector in due course under the Act, "shall thereupon vest absolutely in the Government free from all encumbrances."⁽²⁾ Easements, to which the land taken up under the Act was, at the time of its being taken up, subject, as the servient tenement, were held to be "encumbrances," and the dominant owner was held entitled to receive compensation under the Act for the loss resulting to him from the extinction of his easement.⁽³⁾ And the Act now in force (I of 1894) provides, in the definition of "person interested" (in Sec. 3) that "a person shall be deemed to be interested in land if he is interested in an easement affecting the land."⁽⁴⁾

In cases falling under the Lands Clauses Act (8 & 9 Vic., c. 18) Sec. 68, and the Railways Clauses Act, 1845 (8 & 9 Vic., c. 20) Secs. 6 and 16, respectively, it has been held that "when once a legal right of a claimant has been interfered with by the exercise of the powers conferred on the Company, whether the right so interfered with was a right to the possession of land or a right to an easement, all the damage done to him as the consequence of that interference is the subject

(1) *Collector of the 24-Pergunnahs v. Nobin Chunder Ghose*, 3 S. W. R., Civ. R. 27. So also a public right of way was held to have been extinguished by acquisition, under the same Act, of the land over which the right of way had existed: *In the matter of the petition of Fenwick*, 6 Beng. L. R., Ap. 47.

(2) The provision in the corresponding sections of Act. I of 1894 (secs. 16 and 17) is in the same words.

(3) *Taylor v. Collector of Purnea*, I. L. R., 14 Cal. 423, 431—434.

(4) The definition in the Act of 1870 was: "The expression person 'interested' includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act." This definition is re-enacted in the Act of 1894 with the addition of the words cited above.

of compensation.”⁽¹⁾ In *In re London, Tilbury & Southend Ry. Co., & Trustees of Gower's Walk Schools*⁽²⁾ the claimant, the owner of certain buildings the windows of which were “ancient lights,” pulled them down and erected new buildings on their site. Some of the windows of the new buildings only partially coincided in position with windows in the old buildings, and others occupied wholly different positions from those of any windows in the old building. Before a prescriptive right could be acquired to access of light to the non-coinciding windows or portions of windows of the new buildings, a railway company, in exercise of its statutory powers, erected a warehouse, which obstructed the light to the windows of the new buildings. It was held that the claimant was entitled to compensation in respect of the whole of the windows obstructed, including the windows or portions of windows which did not coincide with any of the ancient lights, though in an action for damages against a person who had acted without the statutory powers in erecting a similar building, obstructing the light to plaintiff's windows, damages would have been recoverable only in respect of the obstruction to those windows or portions of windows which coincided with the ancient lights. Sec. 16 of the Railways Clauses Act, 1845, provides that, in the exercise of the powers granted to it by that Act and the Special Act, the railway company “shall make full satisfaction,” “to all parties interested for *all damage* by them sustained by reason of the exercise of such powers.” “All damage” was held to mean all actual damage sustained, whether legally recoverable otherwise than under the Statute or not. WILLES, J., at the end of his judgment said: “To put it in another way, the party injured by the construction of the works would, but for the statutory powers, be entitled to an injunction, which would prevent the works from being constructed altogether.

(1) *In re London, Tilbury & Southend Ry. Co., & Trustees of Gower's Walk Schools*, L. R., 24 Q. B. D. 40, 44; *In re Stockport, T., & A. Ry. Co.*, 33 L. J., Q. B. 251; *Cowper-Essex v. Local Board of Acton*, L. R., 14 App. Ca. 153.

(2) L. R., 24 Q. B. D. 40; *confmd.* on app., 24 Q. B. D. 326.

Then the intention of the Act, as I understand it, is that the injured party shall, as far as money can do it, be put in the same position as if he had had that injunction, and as if things had been preserved *in statu quo*.”⁽¹⁾ Whether under the Indian Land Acquisition Act, in a like case, the person having *de facto* enjoyment of light to his windows, or of some other benefit in or over land acquired under the Act, of which enjoyment he would be deprived in consequence of such acquisition of that land, but which had not yet matured into a prescriptive easement, would be entitled to compensation for the loss sustained by him by his being deprived of such enjoyment, seems questionable; having regard to the provision in Secs. 24 and 15 of the Land Acquisition Act (I of 1894) that the Court, or the Collector, “shall not take into consideration any damage sustained by him (the person interested), which, if caused by a private person, would not render such person liable to a suit,” and to the fact that, whereas in the (English) Railways Clauses Act it is enacted that the company “shall make *full*”⁽²⁾ satisfaction . . . to all parties interested” and “for *all damage*”⁽²⁾, the provisions in the Indian Land Acquisition Act relating to compensation are not expressed in similar terms. With reference to that provision in Sec. 24 of the Act, it is true, no doubt, that, as against a wrongdoer, a person having only such an inchoate right, but no complete legal right, has a right of action for damages for loss sustained by interference with his *de facto* enjoyment (see note to Sec. 33, page 216, and *Jeffries v. Williams*⁽³⁾ and other cases there cited); but a contention that such person ought to have the same rights to compensation against the Government or the Company acquiring the land, as he would have had against a wrongdoer, could hardly, it is apprehended, be maintained.

Rights of common in the wastes of the lord, annexed to copyholds, are extinguished on enfranchisement of the copy-

Extinction by
enfranchise-
ment of copy-
hold.

(1) L. R., 24 Q. B. D. 44, 45.

(2) The italics are not in the original, but are inserted for the purpose of this note.

(3) 5 Exch. 792; 20 L. J., Exch. 14.

holds : a deed of enfranchisement granting and confirming to a copyholder in fee simple of a house and land the house and land *cum pertinentiis*, does not pass to the grantee a right of common which he, as such copyholder, had ; the reason being that such right of common is not of its nature incident to the copyhold estate, but is a collateral right acquired by usage.⁽¹⁾ But in the case of ancient arable land held as customary freehold in fee simple of the lord of a manor at a quit-rent, heriot, relief or other service, a right of common of pasture in the wastes of the lord, appendant to the land as so held, is not extinguished by enfranchisement, *i.e.*, by the lord releasing his seigniorial rights to the tenant.⁽²⁾ There may be cases of tenures under superior lords, in India, in regard to which questions as to extinguishment or otherwise of rights of common on enfranchisement, might arise, and to which the doctrine of the English law here referred to might have some applicability.

Extinction by
dissolution of
right of ser-
vient owner.

37. When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section ten.

Illustrations.

(a) A transfers Sultánpur to B on condition that he does not marry C. B imposes an easement on Sultánpur. Then B marries C. B's interest in Sultánpur ends, and with it the easement is extinguished.

(b) A, in 1860, let Sultánpur to B for thirty years from the date of the lease. B, in 1861, imposes an easement on the land in favour of C, who enjoys the easement peaceably

(1) *Massam v. Hunter*, Yelverton's Reports, 189 ; see also *Baring v. Abingdon*, L. R., 1892, 2 Ch. 374, at p. 388.

(2) *Baring v. Abingdon*, L. R., 1892, 2 Ch. 374, 384.

and openly as an easement without interruption for twenty-nine years. B's interest in Sultánpur then ends, and with it C's easement.

(c) A and B, tenants of C, have permanent transferable interests in their respective holdings. A imposes on his holding an easement to draw water from a tank for the purpose of irrigating B's land. B enjoys the easement for twenty-nine years. Then A's rent falls into arrear and his interest is sold. B's easement is extinguished.

(d) A mortgages Sultánpur to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of section ten. The land is sold to D in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

38. An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner. Extinction by release.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I.—An easement is impliedly released—

(a) where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority ;

(b) where any permanent alteration is made in the dominant heritage of such a nature as to show

that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations.

(a) A, B and C are co-owners of a house to which an easement is annexed. A, without the consent of B and C, releases the easement. This release is effectual only as against A and his legal representative.

(b) A grants B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual.

(c) A, having the right to discharge his eavesdroppings into B's yard, expressly authorizes B to build over this yard to a height which will interfere with the discharge. B builds accordingly. A's easement is extinguished to the extent of the interference.

(d) A, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(e) A, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on B's land, permanently alters the roof, so as to direct the rain-water into a different channel and discharge it on C's land. The easement is impliedly released.

Commentary.

Express release.

By English law an express release of an easement must be made by deed. There is no rule of the law of India requiring such a release to be made in writing; but if made in writing, and if the consideration or value amounts to one hundred rupees, the instrument must be registered.⁽¹⁾

⁽¹⁾ Registration Act, 1877, S. 3 (definition of "immoveable property"), S. 17 and S. 49.

Explanation
I. (a).
"expressly
authorizes."

Explanation I. can hardly be construed otherwise than as being an exhaustive statement of the modes in which easements can be impliedly released under this Act, and if so, the authorization of the obstruction, mentioned in para.(a), must, in a case governed by this Act, always be an *express* authorization. By the English law such authorization may be implied.⁽¹⁾ In *Fatehyab Khan v. Muhammad Yusuf*,⁽²⁾ the defendants, who had erected a *pucca* building (called a *kotba*) on land over which the plaintiffs had, as residents of a neighbouring *mahalla*, a right of way, thereby obstructing the way, alleged that they were the owners of such land and that the plaintiffs had no right of way and also pleaded a bar to the suit on the ground, not of express consent by the plaintiffs, but of acquiescence on their part by allowing the building to be erected without protest, and relied on. *Ramsden v. Dyson*.⁽³⁾ It was found that the defendants were not the owners of such land and were trespassers, and that they knew that they were building on land over which the plaintiffs had a right of way, and, therefore, on the authority of the case relied on by the defendants themselves, the non-interference on the part of the plaintiffs with the building was no bar to the suit. This Allahabad case is not, of course, referred to as one which, supposing this Act had, at the time, applied to the N. W. P., would have come under this section, for the defendants were not the servient owners and express authorization of the building was not set up; but as a case which is more nearly connected with this section than any other in the chapter.

A was the owner of certain land which was laid out for building and offered for sale in lots. On 12 May 1863 one of these lots, Lot No. 6, was sold to the defendant subject to this condition (amongst others) that the purchaser was required to covenant to build according to the elevation of Lot 2, or such other elevation as the vendor should approve.

(1) See *Bower v. Hill*, 1 Scott. 534, 535; 1 Bing., N. C., 549; *Harrop v. Hirst*, L. R., 4 Exch. 46, 47; *Metropolitan Association v. Petch*, 5 C. B., N. S. 511.

(2) I. L. R., 9 All. 434.

(3) L. R., 1 H. L. 129.

On 26 May of the same year A sold Lot No. 7 to the plaintiff. On Lot No. 7 stood an ancient wall, for which there existed an easement of support from the soil of Lot No. 6, which was adjacent. In the same year the plaintiff raised the ancient wall, which was fifteen feet in height, to the height of twenty-four feet, and the defendant excavated his piece of land for the purpose of laying the foundations of a building to be erected in accordance with his agreement. In consequence of these excavations the plaintiff's wall gave way and fell. The excavations were properly made and were such as were required for a building to be erected in accordance with the agreement. The excavations would not have affected the ground of Lot 7 in its natural state without any wall built on it, but in the opinion of competent experts, they would probably have caused subsidence of that plot as it existed with the ancient wall standing thereon in its original state as it was before it was raised by plaintiff.⁽¹⁾ It was held that, assuming that, upon these facts, there would, but for the agreement, have been an infringement of a right of support, the effect of the agreement was to justify what could otherwise have been an actionable wrong. The act of the defendant which caused the downfall of the wall was done in accordance with the terms of the contract with his vendor, A; and the plaintiff stood in the same position precisely as his vendor, A, had before the purchase of Lot 7.⁽²⁾ *Roubotham v. Wilson*⁽³⁾ was an action for injuring the plaintiff's reversion, by removing the minerals without leaving support to the surface, on which were houses more than twenty years old; whereby the houses were injured. On a special case it appeared that, ninety years before the action, the *locus in quo* was inclosed by an award made under the Inclosure Act, that the surface was allotted to P, under whom the plaintiff claimed, and the minerals to H, under whom the defendant

(1) See para. 11 of the case stated for the decision of the Court, 19 C. B. (N. S.) at p. 196.

(2) *Murchie v. Black*, 19 C. B. (N. S.) 190.

(3) 6 E. & B. 593; affirmed in Exch. Ch., 8 E. & B. 123, and by House of Lords, 8 H. L. C. 348.

claimed: that the award contained a stipulation that the allottees of the mines should have liberty to work the mines, and the allottees of the surface should have no claim to compensation for any consequent sinking of the surface. P executed the award as a deed. H, though he did not execute it, accepted the allotment under it. The houses were afterwards built. By defendant's mining, without negligence and skilfully, the surface unavoidably sunk. It was held, that it sufficiently appeared, that upon the severance of the minerals and the surface, P took the surface as a tenement with only a qualified right of support; that no further right of support had been gained by the erection of the houses and by their standing for more than twenty years; and that the subsequent owners of the surface took it with only the same qualified right of support which P had; and therefore the plaintiff's action was not maintainable. Lord CAMPBELL, C. J., in the judgment of the Court delivered by him, said: "We adhere to the doctrine laid down by this Court in *Humphries v. Brogden*⁽¹⁾ that, where the surface of land and the minerals under it are held as separate tenements by different owners, of common right the owner of the surface is entitled to support from subjacent strata, without reference to the nature of the strata, or the difficulty of propping up the surface. But we there expressly guarded ourselves against the supposition that we intended 'to lay down any rule applicable to a case where the *prima facie* rights and liabilities of the owner of the subjacent strata are varied by the production of title-deeds or by other evidence.'"⁽²⁾

In *Crossley & Sons v. Lightowler*⁽³⁾ the defendants' predecessors in title, riparian owners, had and exercised, in respect of certain dye-works on their land, the right of fouling the water of a river. In 1839 the buildings in which the dye-works had been carried on were dismantled and were afterwards gradually removed, and these dye-works were not

Explanation I,
(b).

(1) 12 Q. B. 739.

(2) 6 E. & B. at p. 601.

(3) L. R., 2 Ch. App. 478; L. R., 3 Eq. 279.

resumed nor the right to use them asserted till 1864, when the defendants came into possession of the land and rebuilt the old premises on a larger scale and proceeded to carry on the dying business therein. The plaintiffs were lower riparian owners, carrying on business as carpet manufacturers at a mill as their predecessors in title had done since 1840 when they built the mill, and large sums of money had been expended by them in connection with the manufactory, for which it appeared that a supply of pure water was requisite. The suit was brought in 1866. It was held that the easement of the defendants' predecessors to pollute the river water had been abandoned.

In *Stileman-Gibbard v. Wilkinson*,⁽¹⁾ an action tried in 1896, the plaintiff, the owner of an ancient mansion, who had, as such, a prescriptive right to certain pews in the chancel of the parish church, was held not to have abandoned his right to the pews by his having, in 1871, removed the materials (wood-work) of the pews and substituted for them chairs, and by the fact of his not having attended the services of the church for some years. In 1883 the plaintiff himself ceased to attend, owing to some change in the mode of conducting the service of which he did not approve; but visitors at his house and his servants continued from time to time to occupy the chairs. In 1885 the vicar and churchwardens caused temporary wooden platforms to be placed in the chancel for the choir, occupying wholly or in part the sites of the plaintiff's pews. The plaintiff protested strongly against what he regarded as an infringement on his legal rights, in letters addressed to the churchwardens and to the bishop of the diocese in the months of May, June and July in that year. Nothing, however, was done, and the choir continued to sit in the chancel. The matter remained in abeyance until 1893, the plaintiff not being in the interval in the habit of attending the church. In 1893 he asserted his rights by removing one of the two platforms and erect-

(1) L. R., 1897, 1 Q. B. 749, 761.

ing on its site an oaken seat. CHARLES, J., before whom the case was tried, said, in his judgment: "It was contended for the defendants, upon the authority of *Moore v. Rawson*⁽¹⁾ and similar cases, that by entirely removing the old pews in 1871 the plaintiff had abandoned his right. . . . But it must be remembered that in every case of this kind the material inquiry must be whether there was any intention to abandon the right, and I am satisfied that in this case no such intention existed either in 1871 or subsequently. The plaintiff did in that year, it is true, alter his mode of enjoyment of the right to sit in that part of the chancel formerly occupied by the pews, using chairs fastened together in place of the old seats. But he did not discontinue his enjoyment. He used the chairs for himself and his household until 1883, when he ceased himself to attend the church, and, in the correspondence which began in 1885 with the churchwardens, the incumbent, and the Ordinary, he indicated throughout a firm determination to maintain his rights. His non-interference with the choir between 1885 and 1893, which was also relied on, was not, in my opinion, anything more than a mere temporary intermittence of the user, and, being unaccompanied by any intention to renounce the right, does not amount to an abandonment."

Even a permanent alteration of the dominant building, such as pulling down a house and building a new one in its place, does not necessarily involve the loss of his easement of light by the dominant owner. Under an Act of Parliament and an Order in Council a church in the City of London, in which there were ancient lights, became vested in the Ecclesiastical Commissioners on trust to pull it down, dispose of the materials, and sell the site. The church was pulled down and the materials disposed of. The next year the owner of the servient land commenced a building thereon, which, if completed, would have interfered with the ancient lights of the church if it had been still standing. In the

(1) 3 B. & C. 332.

interim an attempt had been made to sell the site, but no sale had been effected, and the site remained vacant. It was held that under the circumstances there was no abandonment, but merely a suspension, of the right of light, and an interlocutory injunction restraining defendant from erecting the proposed building was granted.⁽¹⁾ JAMES, L.J., in his judgment, said: "It appears to me that when a building, in which there are ancient lights, has been taken down, though the actual enjoyment of the light has been suspended, there is nothing to prevent the owner from applying to the Court for an injunction to restrain an erection which would interfere with the easement of the ancient lights, where the Court is satisfied that he is about to restore the building with its ancient lights. That was so decided by GIFFARD, L.J., in *Staught v. Burn*.⁽²⁾ . . . I cannot see any distinction between that case and this. There the house was taken down and a wall was left standing with holes in it. Here the church has been taken down, and the fact that no wall has been left standing with holes in it does not, in my opinion, make any substantial difference, because there is no doubt that the property, which is in the City of London, will be sold for the purpose of being built on, and there is very little doubt that, so far as possible, the purchaser from the Ecclesiastical Commissioners will take care to preserve the rights of light." The fact that the dominant owner did not really intend to abandon his right will make no difference, if what he has done leads to the inference of such an abandonment; it is not on his intention, but on the manifestation of his intention, that the question of an implied release depends. Where the owner of a house in which there were ancient lights, had pulled down the wall in which the windows were situate and built in its place a blank wall without any windows, and this state of things had continued for seventeen years, it was held that the burden of shewing that he had not abandoned his right of light lay

(1) *Ecclesiastical Commissioners for England v. Kino*, L. R., 14 Ch. D. 212. See also *Newson v. Pender*, L. R., 27 Ch. D. 43.

(2) L. R., 5 Ch. 163.

upon him, and unless he shewed that at the time when he discontinued the enjoyment of the light he did some overt act to shew that he meant to resume it within a reasonable time, he must be held to have abandoned his right permanently; for by building the blank wall he might have induced another person to become the purchaser of the adjoining land for building purposes, and it would be most unjust to allow him afterwards to prevent such person from carrying those purposes into effect.⁽¹⁾ And in *Midland Railway Co. v. Gribble*⁽²⁾ the following occurs in RIGBY, L. J.,'s judgment: "Mr. Bridgeman argued that abandonment must depend on intention. That to some extent is true; but if there is an intention in a man's mind which is inconsistent with his acts, his acts and not his intention must govern the matter." In that case a line of railway was made through the land of R, and under the Railways Clauses Consolidation Act, 1845, S. 68, the Railway Co. provided, as an accommodation work, a level crossing for R for passage from his lands on one side to his lands on the other side of the railway. Subsequently R sold his lands on one side to P, not granting to P any right of way over the land retained nor reserving to himself any right of way over the land sold. It was held, by the Court of Appeal, that R had thereby abandoned his right of way over the railway, since he thereby shewed conclusively that the way over the railway was no longer of any use to him, and that he never intended to use it thereafter. Where the owner of a house in which were ancient lights had, in 1837, blocked up the windows on the inside with rubble and plaster, but left the bars outside remaining, so that, to a spectator from the outside, it was obvious that there had been windows there, and the windows had remained in that state till 1856, when the owner of the servient land manifested an intention to erect thereon such a building as if erected would have materially obstructed the light to the windows if they

(1) *Moore v. Rawson*, 3 B. & C. 332. See also *Scott v. Pape*, L. R., 31 Ch. D. 554, 567 as to that of the two buildings of the plaintiff which was called the low building.

(2) L. R., 1895, 2 Ch. 827, 834.

were again opened, the jury, upon the direction of the judge, which was approved of by the Court, that if the plaintiff, the dominant owner, had manifested such an appearance of having abandoned the right as to induce the defendant to incur expense or loss in the reasonable belief that the right was permanently abandoned then the plaintiff had abandoned and lost his right, found that he had not abandoned and lost it.⁽¹⁾ They considered that the blocking up of the windows was of such a character as indicated only a temporary discontinuance of the use of them, and not such a blocking up or building up as that described in *Illustration(d)* to this section. If a man having a right of light in respect of a window of his house enlarges his house and in so doing erects a wall with a window in it outside the wall in which the old window is, but the old window still remains and receives the light, the right to light in respect of the old window is not lost.⁽²⁾ If the dominant building be pulled down and rebuilt, with larger and more numerous windows, the fact that the new building has, with reference to the site of the old one, been set forward or set back to some extent, so that the plane of the new windows is not the same as the plane of the old windows, does not operate as a destruction of the right by abandonment, if the new windows receive the same, or a substantial part of the same, cone of light, passing over the servient tenement, as the old windows received. The right is a right to free passage of a certain cone of light over the servient tenement, and does not depend for its maintenance upon the continued structural identity of the windows, but upon the continued enjoyment of either the whole or some material part of the same volume of light—whether the windows remain unaltered or some alteration in size, shape or position be made in them, or entirely new windows be made, and in a different plane, it may be, from the old ones, the building being reconstructed.⁽³⁾ The right may, indeed,

(1) *Stokoe v. Singers*, 8 E. & B. 31.

(2) *Barnes v. Loach*, L. R., 4 Q. B. D. 494, 499.

(3) *Scott v. Pape*, L. R., 31 Ch. D. 554; *Greenwood v. Hornsey*, L. R., 33 Ch. D. 471; *Bullers v. Dickenson*, L. R., 29 Ch. D. 155.

be lost, by such a change being made in the dominant building, by reason that it has become impossible for the dominant owner to prove that the access of light which he is claiming in respect of the new window is the same as that which he was entitled to in respect of the old window.⁽¹⁾ For, unless the new windows, or definite parts of them, can be shewn to coincide with the old windows or definite parts thereof, the right of light is lost; even though the evidence may shew that the new windows cover in part the space occupied by the old windows.⁽²⁾ In *Pendarves v. Monro*, NORTH, J., referring to the previous case of *Fowlers v. Walker*, said: "The plaintiff's premises in that case were a warehouse standing on the site of old houses. It was known where the old buildings had stood; that they were three-storied houses with windows in front; the number and the dimensions of the old windows were known; the width of each house was so narrow that there could not have been any difficulty in coming to the conclusion that some part of the former windows had occupied the site of parts of the existing windows, especially as the new buildings had so much window that the front and side were almost all glass. But by reason of the impossibility of defining precisely where the old windows had been, and the impossibility of identifying any part of the new windows as coincident with a particular part of an ancient light, the plaintiff's case failed for want of evidence."⁽³⁾ See also notes to Secs. 23, 29 and 43.

Although non-user cannot *per se* be an implied release of an easement, it may, by the English law, but apparently not under this Act, be evidence of an abandonment or release.⁽⁴⁾ See Commentary on S. 47.

Explanation II.

39. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

Extinction by revocation.

(1) See *Scott v. Pape*, L. R., 31 Ch. D. 554, 570, 576, 577.

(2) *Pendarves v. Monro*, L. R., 1892, 1 Ch. 611; *Fowlers v. Walker*, 51 L. J. (Ch.) 443.

(3) L. R., 1892, 1 Ch. 613, 614.

(4) *Darling v. Clue*, 4 F. & F. 335, note.

Extinction on expiration of limited period or happening of dissolving condition.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

Commentary.

So, if an easement for a particular purpose has been created,⁽¹⁾ it is extinguished when the purpose ceases to exist.⁽²⁾ The omission of this mode of extinction can hardly, I think, have been intentional.

Extinction on termination of necessity.

41. An easement of necessity is extinguished when the necessity comes to an end.

Illustration.

A grants B a field inaccessible except by passing over A's adjoining land. B afterwards purchases a part of that land over which he can pass to his field. The right of way over A's land which B had acquired is extinguished.

Extinction of useless easement.

42. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

Extinction by permanent change in dominant heritage.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless—

(a) it was intended for the beneficial enjoyment

(1) See s. 6.

(2) *National Guaranteed Manure Co. v. Donald*, 4 H. & N. 8.

of the dominant heritage, to whatever extent the easement should be used ; or

(b) the injury caused to the servient owner by change is so slight that no reasonable person would complain of it ; or

(c) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

Commentary.

The English law appears to be the same as that enunciated in this section, though it is rather inferable from cases in which easements have been held not to have been extinguished from what has taken place, than from any cases in which an easement has been held to have been extinguished in consequence of an increase of the burden. In *Luttrell's case*⁽¹⁾ it was laid down that if a man has estovers (right to take fire-wood) to his house, "although he builds a new chimney, or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimnies, or in the part newly added ; the same law of conduits and water-pipes, and the like." The dominant owner will be within his rights of user of the easement, as laid down in S. 23, and will not lose the easement, if by an alteration of the dominant tenement he does not increase, or appreciably increase, the burden thrown on the servient owner. Thus, in *Harvey v. Walters*⁽²⁾ the plaintiff, who had acquired the right to have the rain-water drop from the eaves of the roof of his building on to the defendant's adjoining land over which those eaves projected, had pulled down the building and rebuilt it, and in so doing had slightly increased the height of the walls and of the roof and eaves. It was held that, in the absence of any evidence that

(1) Coke's Rep., Pt. IV, 86a—89a.

(2) L. R., 8 C. P. 162.

a greater burden was thrown on the servient tenement by the alteration, the easement was not destroyed and plaintiff retained the right of eaves-dropping from the building as altered.

Light.

This section appears to me not to embrace the case of a person, who has an easement of light to a window or windows of his house, enlarging it or them or opening additional windows, because though it may be impossible for the servient owner to block either completely or to a certain extent the light to the new portions of the old windows, or the new windows, without interfering with the light which he is bound to allow to the old windows,⁽¹⁾ yet in so far as this is impossible there appears to be no increase of burden. The enlargement of the windows or opening new windows is not in itself an excessive user of the pre-existing easement; though it is true it may after the lapse of twenty years create an additional easement. The "excessive user" of the easement, therefore, in the case given in the *Illustration* to Sec. 31 is not, it would seem, meant to imply that there is any increased burden imposed thereby on the servient owner; if, indeed, it were, there would be an inconsistency between that *Illustration* and Sec. 43, for then the original right to light would be extinguished under Sec. 43 and there would be this absurdity that according to that *Illustration* the servient owner could not obstruct the excessive user, whereas by the extinction of the easement under Sec. 43 he would be entitled to obstruct, not only the excessive user, but the user for the windows as they were before the increase of their number or size.

The English law upon this question was very clearly settled and laid down by the House of Lords in *Tapling v. Jones*,⁽²⁾ overruling some previous decisions.⁽³⁾ It was, in that case, decided that by opening new windows or enlarging

(1) as was the case in *In re London, Tilbury and Southend Ry. Co. & Trustees of Gower's Walk Schools*, L. R., 24 Q. B. D. 326. See in judgment of LOVES, L. J., p. 333.

(2) 11 H. L. C. 290.

(3) *Renshaw v. Bean*, 18 Q. B. 112; *Hutchinson v. Copestake*, 8 C. B. (N. S.) 102; 9 Id. 863.

his old ones, the owner of a house with windows for which he has a right to light, does no wrong in the eye of the law to his neighbour, who is at liberty to build up against the new windows or the enlargements of the old ones, except so far as (if at all) by doing so he would be obstructing the access of light to the old windows to which the dominant owner was entitled before, and that if the new windows or the enlargement of the old ones are in such a position that they cannot, or cannot conveniently, be obstructed by the servient owner without obstructing the old, the servient owner is not (as was erroneously held in the overruled cases) entitled to do so—in other words the dominant owner does not lose his easement.⁽¹⁾

It may be objected, that, this being the law, (in the words of Lord CHELMSFORD in his judgment in *Tapling v. Jones*⁽²⁾) “a person who has an ancient window may acquire a right to any number of additional windows by so contriving their position as to place them completely under the protection of the ancient window, and thus effectually prevent the adjoining owner's interference with them.” To this objection Lord CHELMSFORD gave this answer: “Undoubtedly this is a very possible case; and yet there does not appear to be anything unreasonable or unjust in denying, even under such circumstances, a power over the ancient lights which did not previously exist. For, consider the case upon the presumption of a grant as it stood before the Prescription Act. The rights of the parties would of course be taken to be regulated by such grant, and it would have been contrary to principle to permit the grantor to derogate from his own grant merely because he could not otherwise prevent an act which might prejudicially affect him, but which the grantee was not prohibited from doing by law. And precisely the same consequences seem to follow from the right being now acquired by user and acquiescence. While the user is ripening into

(1) See judgment of Lord WESTBURY, L. C., 11 H. L. C. 306, 307. See also judgments of COTTON, L. J., and BOWEN, L. J., in *Scott v. Pape*, L. R., 31 Ch. D., 569, 573.

(2) 11 H. L. C., at p. 321.

a right, the adjoining owner has the power completely in his own hands. If he has no objection to the particular window, but is desirous of preventing any enlargement or alteration of it, or any new windows being opened, he may inform his neighbour of his determination to build up against the window unless he will enter into an agreement not to enlarge or alter it, nor to open any new one without his permission. The adjoining owner can therefore always protect himself by a little vigilance; and if he allows rights to be acquired under shelter of which he is prevented using his land for the purpose of defence against the acts of his neighbour, he must blame his own want of foresight and precaution, and not the law, which will not permit an ancient right to be invaded upon any such assumed ground of necessity.”⁽¹⁾ In *Simpson v. Godmanchester Corporation*,⁽²⁾ Lord DAVEY in his judgment said: “It is no objection to the exercise of a lawful right, that it may indirectly benefit other persons or subjects which do not enjoy the same right. If I have one ancient light in my house, I can prevent my opposite neighbour from building on his land so as to obstruct that window, and thereby gain the benefit of an unobstructed access of light to my other windows which are modern, or my next-door neighbour may be benefited by the opposite land not being built on, although he has no right.”⁽³⁾

Sub-section(b)

This exception (b), which might be cited in exemplification of the maxim *de minimis non curat lex*, has been maintained in several reported English decisions.⁽⁴⁾ The word “materially” in the main part of the section seems to me to render this exception (b), if not superfluous, less proper as an exception than if it had been introduced in the form of an explanation.

Support.

In *Murchie v. Black*,⁽⁵⁾ which was a suit for damages for

(1) 11 H. L. C. at pp. 321, 322.

(2) L. R., 1897, A. C. 696.

(3) L. R., 1897, A. C. at p. 708. And see the note on that case in the Commentary on Section 21 (pp. 174—176).

(4) *Hall v. Swift*, 4 Bing., N. C., 381; *Harvey v. Walters*, L. R., 8 C. P. 162; *Thomas v. Thomas*, 2 C. M. & R. 34; *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355, 359.

(5) 19 C. B. (N. S.) 190.

removal of support to the plaintiff's wall, the lower portion of which was an ancient wall for which he had a right of support, but the upper portion had been added by him and in respect of this portion he had acquired no right of support, WILLES, J., in his judgment, expressed the opinion that, by so increasing the weight of the ancient wall, the plaintiff not only did not acquire any right of support for the increment to the old wall, but lost his right of support for the old wall. "It is not like," said his Lordship, "the case of a man, having one ancient window, opening out another. Where an addition is made to the weight of a building, the whole must be considered as one entire weight: as, if a carpenter undertake to make a table capable of sustaining a pressure of one cwt., and the customer puts half a ton upon it, and it breaks in consequence, the latter cannot complain that the former has failed to perform what he undertook to do. I think the plaintiff has, by his own act, destroyed a right which the law would otherwise have given him." But this can hardly be considered as more than an *obiter dictum*, for the other four judges who decided the case decided it upon another ground, viz. that the plaintiff's easement of support for the ancient wall had been renounced by a contract with the defendant authorizing and requiring him to make the excavations which had caused the fall of the wall.⁽¹⁾ The Indian Legislature, however, has, by the last paragraph of this section, made it quite clear that, wherever this Act applies, a person entitled to an easement of support, who materially increases the weight of the dominant tenement and renders it impossible for the servient owner to remove the support to such increment of weight without, at the same time, removing the support to which the dominant tenement was entitled before its weight was so increased, shall not, by so doing, lose that right of support to which he was entitled before he increased the burthen on the servient tenement.

See also SS. 23 and 29 and notes thereto.

(1) See note to s. 38; *Explan. I (a) (ante, p. 254)*.

Extinction on permanent alteration of servient heritage by superior force.

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement :

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage ; and the provisions of section fourteen apply to such way.

Illustrations.

(a) A grants to B, as the owner of a certain house, a right to fish in a river running through A's land. The river changes its course permanently and runs through O's land. B's easement is extinguished.

(b) Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished.

Extinction by destruction of either heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Illustration.

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished.

Extinction by unity of ownership.

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

Illustrations.

(a) A, as the owner of a house, has a right of way over B's field. A mortgages his house, and B mortgages his field to C. Then C forecloses both mortgages and becomes there-

by absolute owner of both house and field. The right of way is extinguished.

(b) The dominant owner acquires only part of the servient heritage: the easement is not extinguished, except in the case illustrated in section forty-one.

(c) The servient owner acquires the dominant heritage in connection with a third person; the easement is not extinguished.

(d) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages: the easements are not extinguished.

(e) The joint owners of the dominant heritage jointly acquire the servient heritage: the easement is extinguished.

(f) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(g) A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished.

Commentary.

So, in English law, unity of *seisin* of the two tenements extinguishes the easement, provided that the *seisin*, of both the tenements, is for an estate in fee simple; if both, or either, of the tenements is held, by the same person, for any lesser estate than a fee simple, the easement is not extinguished but only suspended,⁽¹⁾ and revives on a severance of the unity of ownership.⁽¹⁾

If the union in the same person be only that of the absolute ownership of one of the two tenements with some lesser interest in the other, the easement is only suspended, and upon that person's interest in either of the tenements terminating or passing to another the easement revives, unless it has, pending the suspension, been extinguished by non-enjoyment for 20 years.⁽²⁾

(1) *James v. Plant*, 4 A. & E. 761; *Thomas v. Thomas*, 2 C. M. & R. 34; *Simper v. Foley*, 2 John. & H. 555.

(2) See Sections 49, 51, 47.

The co-owners of certain lands granted a lease of a portion of those lands for 1,000 years, reserving by the lease to themselves, "their heirs and assigns," rights over the land comprised in the lease (such reservation operating either as a regrant to them by the lessee or a covenant by him running with the land). Some years afterwards, on a partition of their lands made between the co-owners, the reversion in the land comprised in the lease became vested in A, one of the co-owners, solely. Subsequently A conveyed his reversion in that land to the lessee. It was held that, on the true construction of the lease, the regrant or covenant was a regrant to or covenant with the lessors as owners of the reversion of the demised land, and not as owners of the adjoining lands, and that therefore, on the merger of the lease, which took place on the lessee acquiring the reversion, the rights which had been reserved by the lease were altogether extinguished.⁽¹⁾

Where the dominant owner became co-owner with another person, by purchase, of the servient tenement, it was held, by MARKBY, J., that the easement was not extinguished.⁽²⁾ This is the converse of the case given in *Illustration(c)*.

Illustrations
(b) and (c).

With reference to the use of the word 'owner' in the Illustrations to this Section, see note to S. 4 (pp. 6, 7) and note to S. 12 (p. 70). To the observations there made the following are submitted additionally. 'Dominant owner' and 'servient owner' are defined in S. 4 as respectively including the occupier as well as the owner of the dominant and servient tenements. In *Illustrations (b) and (c)* of S. 46 it is evident that they are used as meaning the absolute owner only : if they were taken (as they should be according to the definition in S. 4) as including the occupier, the Illustrations would be absurd, because, in the case of *Ill. (b)*, whether the dominant owner acquired the whole or only a part of the servient tenement, the easement would not be extinguished, if the

(1) *Lord Dynevor v. Tennant*, L. R., 13 App. Cas. 279; 33 Ch. D. 420; 82 Ch. D. 375.

(2) *Modhoosoodun Dey v. Bissonath Dey*, 15 Beng. L. R., 361, 365.

dominant owner was only an occupier and not the absolute owner of the dominant tenement, except where the easement had been acquired by grant to him as tenant or occupier only; and in the case of *Ill. (c)*, whether the servient owner acquired the dominant tenement himself alone or "in connection with a third person," the easement would not be extinguished, if the servient owner was only a tenant or other occupier, and not the absolute owner, of the servient tenement.

In the case given in *Illustration(g)*, A becomes entitled to use the way in two capacities, as having a private right and as having a right as a member of the public, but he does not become proprietor of the servient heritage, and therefore the required unity of ownership does not exist. In *Allen v. Ormond*⁽¹⁾ it was held that where the public acquire a right of way over the same soil over which a private right of way already exists, the private right is not merged in, or destroyed by, the public right.

The rule laid down in this section does not appear to hold good in all cases. Suppose that C, the absolute owner of tenement Z, grants to B, the lessee of tenement Y, an easement over tenement Z for the period of his lease, and that subsequently, but during the currency of B's lease of Y, C becomes the absolute owner of Y, by purchase from A who was the absolute owner and lessor to B of Y. Then, the absolute ownership of both the dominant and servient tenements have become united in one person, C; yet B's easement still exists and continues till the expiration of the period for which it was granted to him.⁽²⁾ Again, suppose A, the lessee of tenement Y, acquires by prescription under S. 15 of this Act an easement of light, or of air, or of support, in favor of tenement Y over tenement Z, which is in the possession of B, the absolute owner thereof, or of a tenant of B, and that subsequently, but during the currency of A's lease of Y, the absolute ownership of both tenements becomes

(1) 8 East. 4.

(2) See Sections 6 and 8.

united in one person, A's easement is not, it would appear, thereby extinguished. This would seem to follow from the fact that in the case of an easement of light, or of air, or of support under this Act (as in the case of an easement of light under the English Prescription Act,) it is possible for a tenant of tenement Y to acquire by prescription such an easement against tenement Z (whether Z be in the possession of its absolute owner or of a tenant under him) notwithstanding that the absolute ownership (as, in the English case, the fee simple) of both tenements belongs during the whole period of the prescriptive enjoyment to the same person, and in such case the easement is acquired as appurtenant to the tenement Y and on behalf of the absolute owner of it and against the absolute owner of tenement Z, that is, on behalf of and against the same person.⁽¹⁾

Extinction of easement had by one tenant against another tenant under same landlord.

The Act does not provide for the case where one of two lessees of two distinct tenements under the same lessor has an easement over the other lessee's tenement created by grant (or covenant) from that other lessee,⁽²⁾ and the same person becomes entitled, by purchase or otherwise, to both the leasehold interests. In such a case the easement must, I apprehend, be merged and extinguished by the union of the tenancy title to the two tenements in the same person.

Extinction by non-enjoyment.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner;

⁽¹⁾ See notes to s. 15 (pp. 102, 103, and 109—112), and cases there cited.

See *Illustration (d)* to s. 8; *Illustration (c)* to s. 37.

and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner.

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

- (a) where the cessation is in pursuance of a contract between the dominant and servient owners;
- (b) where the dominant heritage is held in co-

ownership and one of the co-owners enjoys the easement within the said period ; or

(c) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

Illustration.

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

Commentary.

Here the Indian Legislature has made a departure from the English law. Under the English law non-user is not of itself a cause of extinction of an easement ; though non-user may sometimes, in the circumstances of the case, be evidence from which an intention to abandon the easement is inferable.⁽¹⁾ In the Roman law mere non-user was a cause of extinction. In the provisions in this section relating to the time from which the twenty years period is to be computed, the Legislature has followed the rules of the Roman law, which are stated by Hunter thus : " In continuous servitudes, the period of prescription is reckoned from the time that an act is done by the owner of the servient land that negatives the servitude ; in discontinuous servitudes, the period is reckoned from the last time the servitude was used by the owner of the dominant land. (Dig., L. 8, T. 2, 6)."⁽²⁾

In those parts of India to which the Easements Act has

(1) *Cook v. Corporation of Bath*, L. R., 6 Eq. 177 ; *Stokoe v. Singers*, 8 E. & B. 31 ; *Ward v. Ward*, 7 Exch. 838 ; *Crossley v. Lightowler*, L. R., 3 Eq. 279 ; 2 Ch. App. 478.

(2) Hunter's Roman Law, 2nd Ed., 423.

not been extended the English law as to abandonment of an easement and as to the effect of non-user may be held applicable, and it therefore appears necessary to refer to that law. By that law the effect of non-user depends upon the circumstances attending it, and to some extent on the nature of the easement the non-exercise of which is in question. If at the time of the discontinuance of the user or during the non-user the dominant owner does some act or acts from which an intention to abandon the easement is reasonably to be inferred, or without protest or interference allows the servient owner to do acts and incur expense on the footing of the easement having been abandoned, the non-user combined with such conduct on the part of the dominant owner operates as an implied release of the right. But if the non-user is unattended with any such conduct or circumstances from which, having regard to the nature of the particular easement in question, a relinquishment may be inferred, the mere non-user is not sufficient to extinguish the easement. In 1839 A, the owner of a large plot of land, granted by deed to the plaintiffs' predecessor in title a portion of it and a right of road or way over the portion retained by A, alongside the line of boundary of the former portion on its western side and of the latter portion on its eastern side. At the time of the institution of the suit, in 1888, the plaintiffs' piece of land was divided from the other piece of land, which then belonged to the defendant, by an ancient wooden fence, which was shewn to have been there since 1842. Alongside this fence from its southern extremity northward as far as a certain point in it there was no visible track, nor was any user of a road there shewn except on one occasion when the plaintiffs' predecessor was doing repairs to the fence; alongside the fence from its northern extremity southward as far as a certain point in it no track existed and no user was shewn; but alongside the intermediate portion of the fence, between the said two points, there was a road, which appeared to have been in existence as far back as the evidence went and to have been used by the plaintiffs and their predecessors

without disturbance. The defendant and his predecessors used for farm purposes the portions of the land over which the road, in the parts where there had been no user of a road, would pass. It was held that the evidence was insufficient to shew any intention to abandon the right of way over those portions.⁽¹⁾ The Judicial Committee in their judgment said: "It does not appear that occupants of the plaintiffs' land have ever had any occasion to use the northern part of the way, or the southern part, except once, and then they did so use it. . . . Nor is the occupation for agricultural purposes of the strips of land subject to the easement, when the easement was not wanted, in the opinion of their Lordships a conclusive circumstance. It is worthy of notice, in reference to this question of abandonment, that ever since the year 1875 the plaintiffs have distinctly asserted their right to the way which they now claim, and if in the earlier period there is no evidence of such assertion, it must not be forgotten that it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it."⁽²⁾ In *Ward v. Ward*⁽³⁾ a right of way was held not to have been abandoned by non-user of it for upwards of twenty-six years, the only reason for such non-user having been that the dominant owner had during the period of the non-user another more convenient way to and from the dominant heritage. In *Bower v. Hill*⁽⁴⁾ a right of way by boats along a watercourse was held not to have been abandoned by the plaintiff by non-user for sixteen years, during which period the watercourse was impassable by boats owing to the accumulation of mud in it which had been allowed by him to take place without removing it. In *Hale v. Oldroyd*⁽⁵⁾ the plaintiff, the owner of three closes, had a right from time immemorial to the flow of certain water, being the surplus or overflow water of a certain well in the defendant's adjoining close, into a pond in one of his (the plaintiff's) closes. The plaintiff made three

(1) *James v. Stevenson*, L. R., 1893, A. C. 162.

(2) L. R., 1893, A. C. 168.

(3) 7 Exch. 836.

(4) 1 Bing. N. C., 549.

(5) 14 M. & W. 789.

new ponds, one in each of his closes, and cut channels by which the said water was conducted from the defendant's land to these new ponds, and the three new ponds so supplied were used thenceforth until, about thirty years afterwards, the defendant diverted the water, whereupon the plaintiff brought his action. From the time when the new ponds were made the old pond was disused and was gradually filled with rubbish and overgrown with grass. It was held that, though the plaintiff had not acquired a right to the flow of the water in respect of the three new ponds, owing to the fact that for about fourteen years out of the period for which the plaintiff had used the water for supplying them the defendant's close had been in the occupation of a tenant for life of the close and the consequent exclusion of those years under S. 7 of the Prescription Act, 2 & 3 Will. 4, c. 71, in the computation of the prescriptive period, he had not lost by abandonment his right to the flow of the water in respect of the old pond. PARK, B., in his judgment said: "The use of the old pond was discontinued only because the plaintiff obtained the same or a greater advantage from the use of the three new ones. He did not thereby abandon his right, he only exercised it in a different spot; and a substitution of that nature is not an abandonment." In *Seaman v. Vaudrey*⁽¹⁾ a right to mines and access to them reserved in a deed of 1704 was held not to have been abandoned by non-user up to the date of the suit, 1810. It appears indeed from the report that "all springs, veins and mines of brine, salt or salt rock" themselves were reserved besides liberty to sink and make new brine pits, salt pits, &c., and that the case was not one of a mere *profit à prendre*. However the decision appears, at all events to a certain extent, applicable to a mere mining right. The M. R. in his judgment said: "There are many cases where from non-user of a right the inference of abandonment may fairly be made; but that does not apply to such a case as this. It is not so generally true that the owner of

(1) 16 Ves. jun. 890.

mines does work every mine which he has a right to work ; and therefore the relinquishment of the right cannot be presumed from the non-exercise of it. It is well known that mines remain unwrought for generations ; that they are frequently purchased, or reserved, not only without any view to immediate working, but for the express purpose of keeping them unwrought until other mines shall be exhausted ; which may not be for a long period of time. It is impossible therefore to infer that this right is extinguished ; though there is no evidence of the exercise of it since the year 1704." A case in which non-user of an easement was accompanied by circumstances from which it was held the inference of an abandonment must be drawn is *Crossley v. Lightowler*,⁽¹⁾ as to which see Commentary on Explan. 1 (b) to S. 38.⁽²⁾ In *Reg. v. Chorley*,⁽³⁾ in which the question was whether a right of way had been abandoned, the judgment of the Court of Queen's Bench contains the following observations: " We apprehend that, as an express release of the easement would destroy it at any moment, so the cesser of use coupled with any act clearly indicative of an intention to abandon the right would have the same effect without any reference to time. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him ; and what period may be sufficient in any particular case must depend on all the accompanying circumstances."

"Or that the easement could not be enjoyed."

Section 51, third paragraph, shows that the cessation of enjoyment of an easement necessarily resulting from its suspension by reason of union of right to possession of the

(1) L. R., 2 Ch. App. 478 ; L. R., 3 Eq. 279.

(2) See also *Moore v. Rawson*, 3 B. & C. 332, also there referred to.

(3) 12 Q. B. 515, 519.

dominant and servient tenements, will, if it continues for twenty years, extinguish the easement, under this section.

If a dominant owner has been ousted from enjoyment of his easement, it would seem that after twelve years from the date of the dispossession or ouster, a suit by him to recover his right to the easement would be barred under Art. 144 of the Schedule to Act XV of 1877, such a suit being, as it has been held, a suit for an "interest in immoveable property."⁽¹⁾ So a *profit à prendre* was held to be an interest in immoveable property within the meaning of Art. 135 of Act IX of 1871, and a suit for a declaration that the plaintiff was entitled to the *profit à prendre* (*a julkur*) was held to be barred as against the defendant by twelve years adverse user by the latter.⁽²⁾ And on the expiration of such limitation time, the right itself would be extinguished, at least as against the adverse possessor, by Sec. 28 of Act XV of 1877, for 'property,' as used in that Act, appears to include easements: see the Preamble to that Act. Under Act XIV of 1859 also, an easement was held to be an interest in immoveable property, and in a suit for damages for disturbance of an easement it was held that, if the plaintiff had ceased to enjoy it completely for a period of more than twelve years prior to the suit, he had altogether lost his remedy in respect to such easement by sub-sec. 12 of Sec. 1 of that Act.⁽³⁾

Extinction by law of Limitation.

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Extinction of accessory rights.

(1) *Kurupam Zemindar v. Merangi Zemindar*, I. L. R., 5 Mad. 253, 255. The easement in that case was a right to erect a dam and divert water.

(2) *Parbutty Nath Roy Chowdhry v. Mudho Paroe*, I. L. R., 3 Cal. 276. In connection with this it may be mentioned that the Bombay High Court has held a private right of fishing to be a right to immoveable property within the meaning of s. 9 of the Specific Relief Act: *Bhundal Panda v. Pandol Pos Patil*, I. L. R., 12 Bom. 221. See also *Baban Mayacha v. Nagu Shrivacha*, I. L. R., 2 Bom. 19. The Calcutta High Court has held the contrary: *Natabar Parue v. Kubir Parue*, I. L. R., 18 Cal. 80; *Fadu Jhala v. Gour Mohun Jhala*, I. L. R., 19 Cal. 544.

(3) *Viswambhara Rajendra Devu v. Saradhi Charana Samantaraya*, 3 Mad. H. C. R., 111, 112. See also *Charu Surnokar v. Dokouri Chunder Thakoor*, I. L. R., 8 Cal. 956, 959. See Appendix II.

Illustration.

A has an easement to draw water from B's well. As accessory thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section forty-seven. The right of way is also extinguished.

Suspension of easement.

49. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

See note to S. 46.

Servient owner not entitled to require continuance.

50. The servient owner has no right to require that an easement be continued; and, notwithstanding the provisions of section twenty-six, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment.

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Illustration.

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up.

A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

Commentary.

Where, as is sometimes the case, an easement is, or has become, beneficial to the servient owner, he may prefer its continuance to its extinction or suspension. And if the user of the easement has continued for many years, sufficient, so far as length of time goes, to give a prescriptive right, the question arises whether the servient owner can acquire a prescriptive right to the continuance of user of the easement. It was held, in *Mason v. Shrewsbury & Hereford Ry. Co.*,⁽¹⁾ that he cannot. In that case a Canal Company, acting under statutory powers, had, for the purposes of the canal, diverted a considerable part of the water from a stream. This user of the water had continued for nearly half a century, when the defendants, a Railway Company, acting under authority conferred by an Act, purchased the canal, filled it up, and discontinued the use of the water of the stream. The effect of this restoration of the diverted water to the stream was, that the plaintiff's land, which was situated lower down the stream than the point of diversion and restoration of the water, was flooded, and his crops damaged. The plaintiff sued for Damages for disturbance of an easement, which he claimed, of having the water of the stream conveyed away from his lands along the defendant's canal. The majority of the Court held that though in other respects the plaintiff's claim fulfilled the requirements of the Prescription Act, the enjoyment was not *as of right* but was *precario*, and therefore he was not entitled to claim that the diversion of the water should be continued, nor to claim damages for loss caused by its discontinuance.

(1) L. R., 6 Q. B., 578. See also *Arkwright v. Gall*, 5 M. & W. 303,

COCKBURN, C. J., based his judgment on the broad "principle—as it appears to me, (said his Lordship) a fundamental one—that an easement exists for the benefit of the dominant owner alone, and that the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment." (1)

In the course of his judgment in that case BLACKBURN, J., said: (2) "The occupiers of the land lower down the Ashton brook than the canal would naturally suppose things were going to remain in the state in which they had been for so many years, and can in no way be blamed for not anticipating that the canal would be disused, and the waters which had been diverted again turned into the brook; and after that state of things had continued for more than forty years, one would wish to find some legal ground for saying that they had acquired a legal right to prevent this long continued state of things from being altered to their prejudice. But I feel obliged to come to the conclusion that there is no ground on which such a right can be supported." The Indian Legislature has, in the section now under consideration, so far departed from the English law, as to give the servient owner a right to recover damages for loss sustained through the discontinuance or suspension of the easement, unless the dominant owner has given him such notice as will enable him, without unreasonable expense, to prevent the damage.

The case put in the *Illustration* appears to be taken from the case of *Mason v. Shrewsbury & Hereford Ry. Co.*

The cases to which Sec. 26, referred to in this section, relates, are obviously different from those to which this section relates. The former are cases of damage arising during the continuance of an easement and its user; the latter are cases of damage arising on, and by, the extinguishment or suspension of an easement.

51. An easement extinguished under section forty-five revives (a) when the destroyed heritage

(1) L. R., 6 Q. B., pp. 587, 588,

(2) L. R., 6 Q. B., p. 581

is, before twenty years have expired, restored by the deposit of alluvion; (b) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site; and (c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section forty-six revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section forty-seven.

Illustration.

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

Commentary.

See notes to S. 46 as to extinction and suspension from unity of ownership, absolute and otherwise.

If A, instead of either assigning the lease, or surrendering it before expiration of the term, remains lessee for the full term of twenty years, the easement is extinguished under Sec. 47. *Illustration.*

CHAPTER VI.

LICENSES.

"License"
defined.

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

Commentary.

A license is
personal to
the licensee.

Unlike an easement, a license is personal (as opposed to prædial), i.e. it is acquired and held not by virtue of the acquirer being an owner or occupier of immoveable property and in inseparable connection with such property, and it is immaterial whether he is or is not the owner or occupier of any immoveable property. How strictly personal the right is, is shown by the fact (see Sec. 56) that (except in the case of a license to attend a place of public entertainment) a license cannot (unless the license expressly or by necessary implication authorizes it) be transferred or exercised by the licensee's servant or agent.

License in-
volves no in-
terest in pro-
perty.

In *Thomas v. Sorrell*⁽¹⁾ VAUGHAN, C. J., said: "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting

(1) Vaughan, 351; cited in the judgment in *Wood v. Leadbitter*, 13 M. & W., p. 844.

down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, by consequence and not directly, and as its effect, a dispensation or license may destroy and alter property."

There are many reported cases in which the question, or one of the questions, in issue was whether a certain right was a *profit à prendre* or a mere license. In *Duke of Sutherland v. Heathcote*⁽¹⁾ a reservation to the grantor, his heirs and assigns, in a deed of grant of land, of "full and free liberty . . . to search for, get, dig, drain, and carry away the coal, ironstone, and other minerals" within the land granted, was held to be a reservation of an incorporeal hereditament, a *profit à prendre*, and not a mere license. In *Fitzgerald v. Firbank*⁽²⁾ there was a grant by deed to the plaintiffs for a term of years of "the exclusive right of fishing" in a certain portion of a river. The deed also provided that "the right of fishing hereby granted shall only extend to fair rod and line angling at proper seasons, and to netting for the sole purpose of procuring fish baits." It was held that what passed to the plaintiffs by this grant was not a mere license to fish, but an incorporeal hereditament—a *profit à prendre*—involving such possessory rights that they could bring an action of trespass at common law for the infringement of those rights, and that they had a right of action for any disturbance of those rights, either by trespass or by nuisance, or in any other substantial manner. In *Wickham v. Hawker*,⁽³⁾ W., V., and, C. had released and conveyed by deed certain lands to the plaintiff's predecessor in title, "excepting and always reserving, out of the said release and

Difference between license and *profit à prendre*.

(1) L. R., 1892, 1 Ch. 475; L. R., 1891, 3 Ch. 504.

(2) L. R., 1897, 2 Ch. 96. See also *Holford v. Bailey*, 13 Q. B. 426.

(3) 7 M. & W. 63.

conveyance, unto the said W., V. and C., their heirs and assigns, free liberty, with servants or otherwise, to come into and upon the lands so conveyed and there to hawk, hunt, fish and fowl, at any time thereafter at their will and pleasure; and the said [alienor of the land] did thereby grant to W., V. and C., their heirs and assigns, the said liberty so excepted and reserved." The Court reviewed the previous authorities on the difference between a personal license and a *profit à prendre* in cases of rights of sporting (*Duchess of Norfolk v. Wiseman*,⁽¹⁾ *Manwood*, c. 18, s. 3, p. 107, and others) which shewed that a liberty given to a man to do anything for his pleasure simply, without taking any profit, in the grantor's land, is a personal licence only, but a liberty to do anything which includes the taking away and appropriating animals or other things gotten therein, is a *profit à prendre*; that therefore a liberty of fowling, of hawking and of fishing, which imply the right to appropriate the birds or fish taken, are *profits à prendre*; that in the case of a liberty to hunt, if the liberty is given to a man simply, it is merely a personal license to him, but if it is given to him and his servants, or to him, "his heirs and assigns," it is "an interest, or *profit à prendre*." On the same principle, a right of admission to an Opera House was held to be only a license to enjoy an amusement on land, without any profit, and therefore not to be an interest in land;⁽²⁾ whereas a right given to a person by an agreement to share with certain others the right of shooting game on certain land and to appropriate as his own a certain part of the game killed, was held to be a *profit à prendre* and an interest in the land, rendering the contract one within the Statute of Frauds.⁽³⁾

Licensee has no right of action against third persons for interference.

A license, unless combined with a grant of property, gives no right *in rem* to the licensee, and no action is maintainable by him in his own name against a third person for interference with the exercise of his license, even though the

(1) Year Book, 12 Hen. VII, 25, and 13 Hen. VII, 13, pl. 2.

(2) *Tayler v. Waters*, 7 Taunt. 374.

(3) *Webber v. Lee*, L. R., 9 Q. B. D. 315. See also *Wright v. Stewart*, 2 E. & E. 721.

license be an exclusive license. Thus in *Heap v. Hartley*,⁽¹⁾ the plaintiff, to whom had been granted by a patentee of machinery the exclusive license to use the patent within a certain district for a certain time, brought an action against a third party for using some of the patented machines within that district. It was held, by the Court of Appeal, that the license, though an exclusive one, gave the licensee no right of action against the defendant, and that such action could only be brought in the name of the grantor of the license, the patentee. FRY, L. J., in his judgment, said: "An exclusive license is only a license in one sense; that is to say, the true nature of an exclusive license is this. It is a leave to do a thing, and a contract not to give leave to anybody else to do the same thing. But it confers, like any other license, no interest or property in the thing. A license may be, and often is, coupled with a grant, and that grant conveys an interest in property, but the license pure and simple, and by itself, never conveys an interest in property. It only enables a person to do lawfully what he could not otherwise do, except unlawfully. I think, therefore, that an exclusive licensee has no title whatever to sue."⁽²⁾ So in *Hill v. Tupper*⁽³⁾ the grantee from the owner of a canal of the exclusive privilege of having and using boats on the canal was held to be not entitled to sue a third person who placed and used boats on the canal.

The question as to whether a deed of grant amounts to a transfer of an interest in property or is only a grant of a license has frequently arisen in cases of grants of mining rights, in which the question has been whether the deed amounts to a lease or is only a license. In *Doe d. Hanley v. Wood*⁽⁴⁾ C. by deed granted to H. and others free liberty,

Question whether interest in property or only license has been granted.

(1) L. R., 42 Ch. D. 461.

(2) L. R., 42 Ch. D. at p. 470.

(3) 2 H. & C. 121. See also *Whaley v. Laing*, 3 H. & N. 675; 2 H. & N. 476; in which, however, the decision was not upon the point now under consideration.

(4) 2 B & Ald. 724; 21 B. R. 469. See also *Wood v. Lake*, Sayer 3; also reported in footnote in report of *Wood v. Leadbitter*, 13 M. & W. at pp. 848, 849. And see *Ramakrishna v. Unni Check*, 1 L. R., 16 Mad. 280.

license, power and authority to dig for tin and all other metals throughout certain lands, and to raise, make merchantable and dispose of the tin and other metals there found, to their own use; for twenty-one years: and granted various powers and liberties ancillary to the mining powers. It was held that the deed did not amount to a lease, but constituted a license only, coupled with a grant of chattels, *vis.* the ore when obtained by exercise of the license. The Court, in their judgment delivered by ABBOTT, C. J., said⁽¹⁾: "This indenture, in its granting part, does not purport to demise the land, or the metals or minerals therein comprised. The usual technical words of demising such matters are well known and usually adopted in a formal deed, where the intent is to demise the land, or metals or minerals; but the purport of the granting part of this indenture, is to grant, for the term therein mentioned, a liberty, license, power, and authority, to dig, work, mine, and search for metals and minerals, in and throughout the lands therein described, and to dispose of the ore, metals, and minerals only, *that should within that term be there found*, to the use of the grantee, his partners, &c.; and it gives also further powers for the more effectual exercise of the main liberty granted. Instead, therefore, of parting with, or granting, or demising all the several ores, metals, or minerals, that were then existing within the land, its words import a grant of such parts thereof only as should, upon the license and power given to search and get, be found within the described limits, which is nothing more than the grant of a license to search and get (irrevocable, indeed, on account of its carrying an interest,) with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest. If so, the grantee had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals, or minerals, ungot therein; but he had a right of property only as to such part thereof as, upon the liberties granted to him, should

(1) 2 B. & Ald. 738; 21 E. R. 475.

be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines, or metals, or minerals, in the land; and is such a right only as, under the circumstances stated in this case, is not sufficient to support the present action of ejectment."

Where, as in *Winter v. Brockwell*,⁽¹⁾ the license granted is a license to do something, not on the grantor's, but on the grantee's property, which the grantee, owing to an easement which the grantor had or a covenant by which the grantee was bound, was precluded from doing, this may be regarded as a release of an easement (see Sec. 38, *Explanation I*, (a), and *Illustration(c)*) or of a right founded on a covenant (as the case may be), but it is not a license within the definition in this section. Such licenses to do acts on the licensee's property are alluded to in *Krishna v. Bayappa Shanbhaga*⁽²⁾ where, in their judgment, the Court refer to "the further class of cases in which there is a license by A to B to do something upon B's land, the effect of which may be to narrow or extinguish an incorporeal right or easement enjoyed by A over B's land."

License extinguishing or abridging easement.

The right in South Canara called *kumki* has been held not to be an easement, but a right exercised over Government waste by permission of Government.⁽³⁾

Kumki right.

53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.

Who may grant license.

Commentary.

In *Balvantrav Oze v. Ganpatrav Jadhav*,⁽⁴⁾ a license to cut timber granted by one of two or more tenants in common, was

(1) 8 East. 308. The plaintiff, who had an easement of light and air, had granted permission to the servient owner, the defendant, to erect on his (the latter's) land a building obstructing such light and air.

(2) 4 M. H. O. R., at p. 100.

(3) *Nagappa v. Subba*, I. L. R., 16 Mad. 304.

(4) I. L. R., 7 Bom.

336, 339.

held to entitle the licensee to cut timber over the whole land belonging to all the tenants in common. "It is well established," said West, J., in the judgment of the Court delivered by him, "that one of two or more co-tenants may lawfully enjoy the whole in any way not destructive of the substance so as to amount to an ouster of the other co-tenants—*Hole v. Thomas*⁽¹⁾; *Jacobs v. Seward*.⁽²⁾ What a co-tenant may do, however, he may license another to do. This, in fact, is in many cases the only feasible mode of enjoyment. Thus *Anapurnabai*" (one of the two tenants in common) "had a right to license a cutting of the wood, not limited to her own share, but extending to the whole forest held in common. So, too, had the mortgagee. The licensee from either would do no wrong to the other in acting on his license. The rights of the co-tenants *inter se* would be to an account of the profits realized" (the licensee had bought the license), "and a distribution of them according to their proportions of the ownership. This principle has in England been embodied in a Statute, 4 & 5 Anne, c. 16, s. 27, but it is one enforceable by equity—*Denys v. Shuckburgh*⁽³⁾—as resting on natural right, and, therefore, by the Indian Civil Courts."

An owner of land who is subject to certain restrictions in respect of the use of the land imposed by Statute in the interests of the public, or otherwise, cannot lawfully grant a license to make any use of the land which is a use within the restrictions. Thus, where the owner of a part of the shore, *i.e.* the soil situate between high and low water marks at ordinary tides, of the tidal and navigable portion of the river Thames, granted a license to the defendant to take sand from that land, it was held that by the Thames Conservancy Act, 1894, which makes it unlawful "for any person other than the Conservators, their agents, servants and workmen to dredge or raise any gravel, sand, ballast, or other substance from the bed of the Thames" except with the license of the Conservators, the owner of the land in question (which

(1) 7 Ves. 589.

(2) L. R., 4 Q. C. 328.

(3) 4 Y. & C. 42.

was included in the expression "bed of the Thames") was precluded from granting the license to the defendant, and the injunction sued for by the Conservators restraining the defendant from taking sand, &c., from the land was granted.⁽¹⁾

54. The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.

Grant may be express or implied.

Commentary.

By the English law an express grant of an easement must be made by deed,⁽²⁾ and any written instrument purporting to grant an easement, but not being a deed, will, like an oral grant of an easement,⁽³⁾ have the effect of conferring on the grantee only a license, by that law. But a license may, by that law, be given by writing—and either by a writing not under seal, or by a deed;⁽⁴⁾ and the fact that a license is granted by deed does not alter or increase the nature of the right granted: it does not render the license irrevocable, if it is otherwise revocable.⁽⁵⁾ In the judgment in *Wood v. Leadbitter* the Court said: "A license under seal (provided it be a mere license) is as revocable as a license by parol; and,

Express grant.

(1) *Thames Conservators v. Smeed, Dean & Co.*, L. R., 1897, 2 Q.B. 334.

(2) *Hewlins v. Shippam*, 5 B. & C. 229; *Liggins v. Inge*, 7 Bing. 682, 691; *Aldin v. Latimer Clark, Muirhead & Co.*, L. R., 1894, 2 Ch. 437, 448. This rule of the English law applies to all incorporeal hereditaments, and for whatever estate or interest they may be granted. In *Wood v. Leadbitter*, 13 M. & W., 838, at p. 842, the Court, in their judgment, said: "There is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject-matter: a right of common, for instance, which is a *profit à prendre*, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years without a deed, than in fee simple."

(3) *Cocker v. Cowper*, 1 C. M. & R. 418; *Liggins v. Inge*, 7 Bing. 682, 691; *Wood v. Leadbitter*, 13 M. & W. 838, 845.

(4) *Wood v. Leadbitter*, 13 M. & W. 838.

(5) *Krishna v. Rayappa Shanbhaga*, 4 M. H. C. R. 98, at p. 99; *Wood v. Leadbitter*, 13 M. & W. 838, 845; *Gwyot v. Thomson*, L. R., 1894, 3 Ch. 388.

on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a *valid* grant, and it is therefore revocable.”⁽¹⁾ And in *Guyot v. Thomson*,⁽²⁾ LOPES, L. J., in his judgment, said: “I think that this is not a revocable license. The license, so to call it, is created by deed and for valuable consideration. *That would not in itself prevent its being revocable*;⁽³⁾ but it is a license for the residue of the term of the letters patent.” &c. By the English law as well as by the law of India, a valid grant of a mere license can be made orally.

Implied grant. Where a landowner has allowed, without interference or remonstrance, or even with active co-operation on his part, something to be done and continued to be done on his land by another person, which is in itself an encroachment on his exclusive rights of enjoyment of his land, he is estopped by such acquiescence from obtaining any relief against that person for the act so done, and such acquiescence is a virtual or implied grant of leave or license to do the act.⁽⁴⁾

Accessory
licenses an-
nexed by law.

55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

Illustration.

A sells the trees growing on his land to B. B is entitled to go on the land and take away the trees.

(1) 13 M. & W., p. 815.

(2) L. R., 1894, 3 Ch. 388, at p. 398.

(3) These italicized words are not in italics in the original.

(4) *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 78; *Davies v. Marshall*, 10 C. B. (N. S.) 697.

Commentary.

So, where by a clause in a lease of land all the hedges and trees were reserved to the landlord, the right to the trees was held to carry with it a license to enter the land and remove the trees.⁽¹⁾ Where the license claimed was found on the evidence to be convenient and economical in comparison with any other possible means of supplying the claimant's want, but not absolutely necessary for the enjoyment of the property in respect of which it was claimed, the claim was held unsustainable.⁽²⁾ Where the right claimed as necessary to enjoyment of an interest, is claimed by the grantee of immoveable property, as such, over other immoveable property of the grantor, the case is one of a claim to an easement of necessity.⁽³⁾

Illustration.

56. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.

License when transferable.

Illustrations.

(a) A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immoveable property of B. The right cannot be transferred.

(b) The Government grant B a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

Commentary.

An intention that the license shall be transferable may be expressed by granting it to a man "and his assigns." In

(1) *Hewitt v. Isham*, 21 L. J., Exch. 85. To bring this case, strictly within the wording of s. 52 the reservation must be regarded as a grant, or regrant, from the lessee to the lessor.

(2) *Bankart v. Tennant*, L. R., 10 Eq. 141, 147. (3) See section 13.

Muskett v. Hill⁽¹⁾ a license to search for and get minerals and carry away the ore was held to be assignable, because it was not a mere license but was conjoined with a grant of such ore as might be got and carried away. In that case, too, the license was granted to the licensees, "their executors, administrators, and assigns." A license granted by A to B for a certain number of years to trap and take a certain number of elephants in A's forest, paying A a certain portion of the estimated value of the elephants, was held not to entitle the licensee to transfer his license or any part of the rights contained therein.⁽²⁾

Grantor's duty to disclose defects.

57. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

Grantor's duty not to render property unsafe.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

Grantor's transferee not bound by license.

59. When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

Commentary.

A license is not imposed (to use the expression adopted by the Legislature in Ch. II of this Act) on the land of the grantor, as an easement is, but merely on the grantor personally. It is personal to the grantor, as well as to the grantee. Therefore it only lasts so long as the grantor's proprietary or occupancy rights (as the case may be) over

(1) 5 Bing., N. C., 694, 707. See also *Palmer's case*, 6 Rep. 25; *Grantam v. Hawley*, Hob. 132.

(2) *Ramakrishna v. Unni Check*, I. L. R., 16 Mad. 280.

the land continue; as soon as he parts with those rights, by sale, lease or other transfer, with the extinction of his right over the land must necessarily be extinguished the license.⁽¹⁾

See also note to Sec. 61.

60. A license may be revoked by the grantor, License when
revocable.
unless—

(a) it is coupled with a transfer of property and such transfer is in force :

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

Commentary.

In the judgment of the Court in *Wood v. Leadbitter* delivered by him ALDERSON, B., said :⁽²⁾ “ Brooke, in his Abridgment, DODDERIDGE, J., in the case of *Webb v. Paternoster*,⁽³⁾ and Lord ELLENBOROUGH in the case of *R. v. Horndon-on-the-Hill*,⁽⁴⁾ all state in the most distinct manner that every license is and must be in its nature revocable, so long as it is a mere license. Where, indeed, it is connected with a grant, there it may, by ceasing to be a naked license, become irrevocable.” The English law as so laid down in *Wood v. Leadbitter* was in a Bengal case, decided by the High Court in 1889,⁽⁵⁾ held to be the law obtaining there.

The licensor's right of revocation is not affected by the fact that it has been granted for a consideration.⁽⁶⁾ In *Wood v. Leadbitter*⁽⁷⁾ the plaintiff, who had purchased a ticket which

(1) See *Wallis v. Harrison*, 4 M. & W. 538, 543; *Plummer v. Webb*, Noy. 98; and see s. 61, *Illustration(b)*.

(2) 13 M. & W. 838, at p. 851.

(3) Poph., 151; Palmer, 71.

(4) 4 M. & S., 562.

(5) *Prosonna Coomar Singha v. Ram Coomar Ghose*, I. L. R., 16 Cal., 640.

(6) *Wood v. Leadbitter*, 13 M. & W. 838; *Hewlins v. Shippam*, 5 B. & C. 221; *Bryan v. Whistler*, 8 B. & C. 288; *Fentiman v. Smith*, 4 East, 107; 7 R.R. 533; *R. v. Horndon-on-the-Hill (Inhabitants of)*, 4 M. & S. 562.

(7) 13 M. & W. 838,

purported to entitle the holder to enter and be upon an enclosure on a racecourse during certain races, was ejected from the enclosure by order of the owner of the soil, and it was held that, even assuming that the ticket had been sold to the plaintiff under the sanction of the owner of the soil, the latter was entitled, without returning the guinea paid for the license, and without assigning any reason for what he did, to order the plaintiff to quit the enclosure. In the course of their judgment the Court of Exchequer said⁽¹⁾: "It was suggested that, in the present case, a distinction might exist, by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference; whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand in spite of the owner of the soil; and it is sufficient, on this point, to say that in several of the cases we have cited (*Hewlins v. Shippam*,⁽²⁾ for instance, and *Bryan v. Whistler*⁽³⁾) the alleged license had been granted for a valuable consideration, but that was not held to make any difference." Where, however, a license has been granted for consideration upon a contract therefor, and the revocation of the license involves a breach of the contract, an action by the licensee for damages for breach of the contract is maintainable.⁽⁴⁾ See note to S. 64.

Nor is a license irrevocable by its being granted by deed.⁽⁵⁾

"A mere licence is revocable; but that which is called a license is often something more than a license: it often comprises or is connected with a grant, and then the party

Sub-section
(a).

(1) 13 M. & W. 855.

(2) 5 B. & C. 221.

(3) 8 B. & C. 288.

(4) *Kerrison v. Smith*, L. R., 1897, 2 Q. B. 445. See also *Prosonna Coommar Singha v. Ram Coommar Ghose*, I. L. R., 16 Cal. 640.

(5) See note to s. 54 pp. 291, 292.

who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.”⁽¹⁾

While the license must be a license to do something in or upon immoveable property,⁽²⁾ the property transferred (where there is an accompanying transfer of property) may be moveable property; as, *e.g.*, where a sale of goods deposited on the vendor's land was combined with the grant of a license to the vendee to leave them there for a certain time and then to enter the land and remove them;⁽³⁾ or where with a grant of a license to dig for and extract ore in the grantor's land was combined a grant of such of the ore as should be dug and got by the grantee (such ore when so dug and got being a personal chattel).⁽⁴⁾

If a license is combined with what purports to be a grant or transfer of property, but the intended grant or transfer of property is invalid or void, the license is, of course, revocable. In *Wood v. Leadbitter* the Court in their judgment said: “Where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a *valid* grant, and it is therefore revocable.”⁽⁵⁾ So, if a grant of a license were coupled with a transfer of immoveable property in British India which was not effected in accordance with requirements of the Indian law, as, *e.g.*, if it were a sale, or a lease, or a gift, of such property, not made in the manner required by S. 54, S. 107, or S. 123, of the Transfer of Property Act, the license, being a bare license (that which purported to be a transfer of property with which it was coupled having failed to be effected), would be revocable.

Guyot v. Thomson⁽⁶⁾ was a case of a license to use a patent, but appears, to some extent, at least, to bear upon cases of

(1) *Per* the Court, in judgment, in *Wood v. Leadbitter*, 13 M. & W., at pp. 841, 845.

(2) See s. 52.

(3) *Wood v. Manley*, 11 A. & E. 34.

(4) *Doe d. Hanley v. Wood*, 2 B. & Ald. 724. 738, 739; 21 R. R. 469. See also *Newby v. Harrison*, 1 J. & H. 393.

(5) 13 M. & W. 845.

(6) L. R., 1894, 3 Ch. 388.

licenses of the kind to which alone this Act applies. In that case the defendant, a patentee, in consideration of a sum paid and of royalties to be paid half-yearly, granted by deed—the grant purporting to be made by him “as beneficial owner”—to the plaintiffs, “their executors, administrators and assigns,” the exclusive right to manufacture, use and sell the patented inventions for the unexpired term of the patent, or any renewal thereof. There were covenants by the licensees, to pay the royalties, and to advertise and push the sale of the inventions and use their best endeavours to further their success, and to keep accounts of all the articles manufactured under the license and the sales thereof. They were authorized to grant sub-licenses. The patentee was not to sue for infringement of the patent without the licensees’ consent in writing. The licensees were empowered to determine the license at any time on giving certain notice; but no such power to the patentee was contained in the deed. It was held that the license was not revocable at the will of the licensor. LINDLEY, L. J., in his judgment, said, after referring to the deed: “What is the true effect of that document? To call it a mere revocable license appears to me to call it that which it clearly is not. A person who has a license is not bound to exercise it for any time, and the person who grants a license does not come under any obligations to the licensee except not to treat him as a trespasser if it is a license to go upon land, and not to take advantage of some condition or clause which he could take advantage of but for the license. But this document imposes very serious obligations and duties, both on the so-called licensees and on the so-called licensor, and it would be a strange construction of this document to hold that the grantor of this license could at any moment relieve himself from the obligation under which he has come, by giving notice to determine it. I think it is plain, when you come to look at this document, that the true meaning of it is, that the patentee grants to the licensees the exclusive right to use this patent for the unexpired term of the patent, or any renewal thereof.

That involves on his part an obligation not to use the patent himself, which is a most important matter. It involves on the part of the licensees the duty, in the terms of clause 2, of advertising and pushing the sale of the inventions, and using their best endeavours to further their success. Now, who ever heard of such obligations as those attached to what is called a mere license? The truth is, that this is a grant of a right to use the patent, coupled with obligations both on the grantor and on the grantees. I should hesitate before I called this a license coupled with an interest. That is an ambiguous expression, and, of course, before one uses it one would like to understand the meaning of it. Coupled with an interest in what? I do not know that there is any interest, as distinguished from the right which the licensees acquire under the license to do what it authorizes and to restrain the licensor from himself using the patent during the continuance of the license. Interest in this sense the licensees have, but they are not assignees of the patent. It was suggested that we might construe this instrument as amounting to an assignment of the patent; but the clause which shews that the right to sue for an infringement is in the patentee excludes that view. It is not, therefore, quite an assignment of the patent. There is not very much difference between this and an assignment; but that clause prevents us from holding that it is an assignment of the patent. But when we come to read the document, we find several clauses which are so inconsistent with the right to revoke, that we cannot hold that there is such a right to revoke, or, varying the language, it appears to me that on the face of this document there is an implied covenant not to revoke, and I get at that quite apart from any considerations arising upon the Conveyancing Act, for I do not think that this is a conveyance within the meaning of the Conveyancing Act. But it does not follow that the introduction of the words "as beneficial owner" is unimportant. Those words shew that the parties did not mean to treat this as a revocable license. That is not the form which would be used if it were intended

to grant a mere license. I am happy to say that we are not driven by any of the cases to do that which would be a clear injustice and utterly unwarranted.”(1)

Sub-section
(b).

In a Madras case decided in 1863, *STRANGE and HOLLOWAY, JJ.*, held a license to erect a dam to be revocable, but the licensee to be entitled, on revocation of the license, to compensation for the expense which he had incurred on the strength of the license in erecting the dam: they said: “following the authority of several cases in the late Sadr Court, we are of opinion that the revocation should only be permitted on the terms of the plaintiff paying to the defendant the expenses which he was induced by that permission to incur.”(2)

Sub-section
(b).

The law enacted in sub-section(b) of this section agrees with the English law:—see *Laird v. Birkenhead Railway Co.*(3); *Rochdale Canal Co. v. King*(4); *Winter v. Brockwell*(5); *Liggins v. Inge*(6). In *The Land Mortgage Bank of India v. Moti*(7) the plaintiff, a zamindar, claimed to have his right declared to build a house on some waste land in the mouza. Defendants, tenants of the mouza, resisted the claim on the ground of their having built wells and watercourses on this land, and of their having a right also to use it as a threshing floor and for stacking cow-dung. They were found, on the evidence, to be licensees of the plaintiff, and their right of use of the land was held to be revocable by the plaintiff, “except in respect of the wells, which are works of a permanent character, and on which the defendants have incurred expenses.”

Revocation
express or im-
plied.

61. The revocation of a license may be express or implied.

Illustrations.

(a) A, the owner of a field, grants a license to B to use a

(1) L. R., 1894, 3 Ch. 397, 398.

(2) *Kesava Pillai v. Peddu Reddi*, 1 M. H. C. R., 258, at p. 260.

(3) John. 500, 511.

(4) 2 Sim. (N. S.) 78, 88.

(5) 8 East. 308.

(6) 7 Bing. 682.

(7) L. R., 8 All. 69, 70.

path across it. A, with intent to revoke the license, locks a gate across the path. The license is revoked.

(b) A, the owner of a field, grants a license to B to stack hay on the field. A lets or sells the field to C. The license is revoked.

Commentary.

The obligation on the licensor being only a personal one (see note to Sec. 59), the grant of a license implies that it cannot last beyond the duration of the licensor's interest in the property over which the license is granted. Alienation by him of his interest, therefore, is an implied revocation of the license: he thereupon ceases to be bound by the license.⁽¹⁾ And in *Wallis v. Harrison*,⁽¹⁾ Lord ABINGER, C.B., said that it was not necessary for the licensor to give notice to the licensee of the alienation.

Implied revocation.

An obstruction to the exercise of a license, if made by the licensor, is, unless the license is irrevocable, lawful and operates as a revocation.⁽²⁾ But a licensee under a revocable license is entitled to a reasonable notice of such obstruction, and if no such notice is given he is entitled to recover damages for the loss (if any) which he has sustained by reason of the obstruction having been caused without such notice having been given.⁽³⁾ Though the license in question in *Aldin v. Latimer Clark, Muirhead & Co.*,⁽⁴⁾ being a license, to a lessee, to make and maintain ventilators, in walls of the building demised to him, and enjoy the access of air thereto passing over other adjoining premises of the lessor, was not, so far as such enjoyment went (which was obstructed), a license to do something in or upon the property of the grantor, and therefore not, so far, a license falling within the definition given in Sec. 52 of this Act, the principle of the decision

(1) *Wallis v. Harrison*, 4 M. & W. 538 (see judgment of Lord ABINGER, C. B.).

(2) *Hyde v. Graham*, 1 H. & C. 593; *Aldin v. Latimer Clark, Muirhead & Co.*, L. R., 1894, 2 Ch. 437, 448.

(3) *Aldin v. Latimer Clark, Muirhead & Co.*, L. R., 1894, 2 Ch. 437, 448; *Mellor v. Watkins*, L. R., 9 Q. B. 400.

(4) L. R., 1894, 2 Ch. 437.

in that case appears to apply equally to the positive licenses which alone are dealt with in this Act, and the learned judge who decided that case⁽¹⁾ stated the law on the point in general terms, such as to apply to licenses generally, whether positive or negative: he said: "It appears, however, from *Mellor v. Watkins*,⁽²⁾ that a licensee under a revocable license is entitled to reasonable notice of the revocation of the license."⁽³⁾ And see the observations, quoted in the note to Sec. 63, of WILLES, J., in *Cornish v. Stubbs*,⁽⁴⁾ and of BLACKBURN, J., in *Mellor v. Watkins*⁽⁵⁾; in both of which cases the license was a license to do something on land belonging to the grantor of the license.

License when
deemed revoked.

62. A license is deemed to be revoked—

(a) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license:

(b) when the licensee releases it, expressly or impliedly, to the grantor or his representative:

(c) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled:

(d) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right:

(e) where the licensee becomes entitled to the absolute ownership of the property affected by the license:

(1) STIRLING, J.

(3) L. R., 1894, 2 Ch. 448.

(2) L. R., 9 Q. B. 400.

(4) L. R., 5 C. P. 334. at pp. 339, 340.

(5) L. R., 9 Q. B. 400, at p. 405.

(f) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable :

(g) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist :

(h) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee :

(i) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

63. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

Licensee's
rights on revo-
cation.

Commentary.

This is the same as the English law.⁽¹⁾ In *Mellor v. Watkins*⁽²⁾ COCKBURN, C. J., in his judgment, said : " Principle, reason, and common sense alike require that, although a license may be revocable at any moment, the licensee should have a reasonable time for removing off the premises what he has been licensed to put upon them ; and the judgment of the Court of Common Pleas in *Cornish v. Stubbs*⁽³⁾ fully upholds that proposition." And BLACKBURN, J., in the same case, in his judgment, said : " It seems but reasonable that the person giving the license, though revocable at any time,

(1) *Cornish v. Stubbs*, L. R., 5 C. P. 334; *Mellor v. Watkins*, L. R., 9 Q. B. 400. See also *Aldin v. Latimer Clark, Muirhead & Co.*, L. R., 1894, 2 Ch. 437. And see note to sec. 61.

(2) L. R., 9 Q. B. 400, at p. 405.

(3) L. R., 5 C. P. 334.

must give the licensee sufficient time to remove the articles from the premises; and, at all events, that he is bound to give the licensee reasonable notice; none whatever appears to have been given here. I am happy to find that this position has already been established by the case of *Cornish v. Stubbs*,⁽¹⁾ in which the judgment of WILLES, J., goes most fully into the principle, and is amply sufficient to govern the present case."⁽²⁾ In *Cornish v. Stubbs*⁽³⁾ WILLES, J., in his judgment said⁽⁴⁾: "With respect to the license to stack timber upon the wharf, there may be more difficulty. . . . Under a parol license the licensee has a right to a reasonable time to go off the land after it has been withdrawn before he can be forcibly thrust off it: and he could bring an action if he were thrust off before such a reasonable time had elapsed. That was Lord CRANWORTH's opinion in *Wood v. Leadbitter*⁽⁵⁾; for he did not tell the jury that if they were satisfied that notice had been given to the plaintiff to quit the ground the defendant was justified in removing him, but that if they were satisfied that such notice had been given, and that before he was forcibly removed by the defendant a reasonable time had elapsed during which he might have gone away voluntarily, then the plaintiff was not, at the time of the removal, on the ground by the leave and license of Lord Eglintoun; and I take it that the Court of Exchequer adopted that summing up. In looking into the judgment in that case, it will be found that the cases as to persons putting goods on other persons' land were all reviewed, and the Court seem to have held that they were to be dealt with on the same principle as cases of personal license. Applying that view to the present case, I think that the barons would clearly have thought that the license to put the goods upon the defendant's land involved a right to take away his goods, and to have a reasonable time for doing so. It was on that ground that the Court approved of the decision in

(1) L. R., 5 C. P. 334.

(2) L. R., 9 Q. B. at pp. 405, 406.

(3) L. R., 5 C. P. 334.

(4) L. R., 5 C. P. 339.

(5) 13 M. & W. 838.

Wood v. Manley,⁽¹⁾ which was the case of a license coupled with an interest. I think, therefore, that the license (which was probably limited to stacking for the use of the trade carried on in the warehouse), if revocable, was so only on the terms of the plaintiff having time to remove his goods."

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

Licensee's
rights on evic-
tion.

Commentary.

The fact that the license has been granted for a consideration makes no difference in regard to the right of revocation of the licensor. But where by revoking a license the licensor commits a breach of contract, an action for damages for the breach of contract is maintainable by the licensee.⁽²⁾ In *Kerrison v. Smith*,⁽²⁾ the defendant, an inn-keeper, agreed orally with the plaintiff, who was a bill-poster, to let his (the defendant's) wall to the plaintiff for 2l. 10s. per annum for the purpose of posting advertisements, one of the terms being that the plaintiff should erect in front of the wall a hoarding, on which the advertisements were to be posted. The plaintiff erected the hoarding accordingly, and proceeded to post advertisements thereon. After he had been posting his advertisements for some time, during which he had made payments to the defendant from time to time, the defendant gave him notice requiring him to remove the hoarding and advertisements. The plaintiff not having complied with the notice, the defendant nearly a month afterwards took down the hoarding and advertisements and sent them to the plaintiff. In an action for damages for breach of the contract, it was held⁽³⁾ that, though there was no demise, but only a

(1) 11 Ad. & E. 34. (2) *Kerrison v. Smith*, L. R., 1897, 2 Q. B. 445.

(3) By a Division Bench (LAWRENCE and COLLINS, JJ.).

revocable license to post the advertisements, the action was maintainable for breach of contract, and the plaintiff was therefore wrongly nonsuited by the County Court judge. COLLINS, J., said, in his judgment:⁽¹⁾ "The County Court judge has assumed that the right to revoke a license, which unquestionably exists on the authority of *Wood v. Lead-bitter*,⁽²⁾ was enough to decide the present case against the plaintiff. The case was considered in the Court below on the footing that there was a license and nothing more. It was conceded that the grantor has a right to revoke a license, but the point set up by the plaintiff, that there was a contract, for the breach of which the plaintiff was entitled to recover damages, was never properly dealt with. There appears to be no case in which the point has been specifically raised and decided, as to whether there is a right to maintain an action for breach of contract, if a license is revoked, although there is a right to revoke the license, but on principle it seems to me that the two rights are compatible with one another." The learned judge then referred to passages in the judgments in *Wood v. Leadbitter*,⁽³⁾ *Wells v. Kingston-upon-Hull Corpn.*,⁽⁴⁾ and *Bulter v. M., S. & L. Ry. Co.*,⁽⁵⁾ as tending to support the view that an action for damages for revocation of a license is maintainable where the revocation is in breach of a contract.

In a case where a license to construct a work was granted without consideration, the Madras High Court held the licensee entitled to be recouped by the licensor the expenses which he had incurred in constructing the work on the licensor revoking the license.⁽⁶⁾ See note to Sec. 60, sub-section(b).

(1) L. R., 1897, 2 Q. B. 448.

(3) 13 M. & W. 838, at p. 855.

(2) 13 M. & W. 838.

(4) L. R., 10 C. P. 402, at p. 409.

(5) L. R., 21 Q. B. D. 207, at pp. 210, 211, 213.

(6) *Kesava Pillai v. Peddu Reddi*, 1 M. H. C. R. 258.

APPENDIX I.

ACT No. VIII OF 1891.

PASSED BY THE GOVERNOR-GENERAL OF INDIA
IN COUNCIL.

[Received the assent of the Governor-General on the
6th March, 1891.]

*An Act to extend the Indian Easements Act, 1882, to certain
areas in which that Act is not in force.*

WHEREAS it is expedient to extend the Indian Easements
Act, 1882, to certain areas in which that Act is not in force ;
It is hereby enacted as follows :—

1. The Indian Easements Act, 1882, is hereby extended
to the territories respectively administered by the Governor
of Bombay in Council and the Lieutenant-Governor of the
North-Western Provinces and Chief Commissioner of Oudh.

Extension of
Act V, 1882, to
Bombay and
the North-
Western Pro-
vinces and
Oudh.

APPENDIX II.

ACT No. XIV OF 1859.

[Received the assent of the Governor-General on the
5th May, 1859.]

An Act to provide for the Limitation of Suits.

WHEREAS it is expedient to amend and consolidate the laws
relating to the limitation of suits ; It is enacted as follows :—

Preamble.

I. No suit shall be maintained in any Court of Judica-
ture within any part of the British territories in India in

Limitation of
suits.

which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding ; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say:—

* * * * *

Limitation of
12 years.
Suits for im-
moveable prop-
erty.

12. To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose.

APPENDIX III.

ACT No. IX OF 1871.

An Act for the Limitation of Suits and for other purposes.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts ; And whereas it is also expedient to provide rules for acquiring ownership by possession ; It is hereby enacted as follows :—

Short title.

1. This Act may be called “ The Indian Limitation Act, 1871 : ”

Extent of
Act.

It extends to the whole of British India ; but nothing contained in sections two and three or in Parts II and III applies—

- (a) to suits instituted before the first day of April, 1873,
- (b) to suits under the Indian Divorce Act,
- (c) to suits under Madras Regulation VI of 1831.

Commence-
ment.

This Act shall come into force on the first day of July, 1871.

* * * * *

Acquisition of
right to ease-
ments.

27. Where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an

easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(a).—A suit is brought in 1871 for obstructing a right of way. The defendant admits the obstruction but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January 1850 to 1st January 1870. The plaintiff is entitled to judgment.

(b).—In a like suit also brought in 1871 the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1848 to 1868. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(c).—In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed,

Exclusion in
favour of re-
versioner of
servient tene-
ment.

28. Provided that, when any land or water upon, over or from which any easement (other than the access and use of light and air) has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof,

the time of the enjoyment of such easement during the continuance of such interest or term, shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a deceased Hindu widow, had a life-interest in the land, that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

APPENDIX IV.

ACT No. XV OF 1877.

An Act for the Limitation of Suits, and for other purposes.

Preamble.

WHEREAS it is expedient to amend the law relating to the limitation of suits, appeals and certain applications to Courts; And whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Indian Limitation Act, 1877."

Extent of Act.

It extends to the whole of British India; but nothing con-

tained in Sections two and three or in Parts II and III applies—

- (a) to suits under the Indian Divorce Act, or
- (b) to suits under Madras Regulation VI of 1831 ;

And it shall come into force on the first day of October, 1877. Commence-
ment.

* * * * *

3. In this Act, unless there be something repugnant in the subject or context— Interpretation
clause.

* * * * *

‘easement’ includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting, upon the land of another :—

* * * * *

26. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years, Acquisition of
right to ease-
ments.

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claim-

ant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(a).—A suit is brought in 1881 for obstructing a right of way. The defendant admits the obstruction but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January 1860 to 1st January 1880. The plaintiff is entitled to judgment.

(b).—In a like suit also brought in 1881 the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1858 to 1878. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(c).—In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

Exclusion in
favour of re-
versioner of
servient tene-
ment.

27. Provided that, when any land or water upon, over, or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a Hindu widow, had a life-interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

APPENDIX V.

THE ENGLISH PRESCRIPTION ACT.

2 & 3 Wm. IV. c. 71.

An Act for shortening the Time of Prescription in certain Cases.

[1st AUGUST 1832.]

I. WHEREAS the expression "Time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons. in this present Parliament assembled, and by the authority of the same, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our Sovereign Lord the King, his Heirs or Successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the

Claims to right of common and other profits *à prendre* not to be defeated after thirty years enjoyment by shewing the commencement;

After sixty years enjoyment the right to be absolute, unless had by consent or agreement.

same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

In claims of right of way or other easement the periods to be twenty years and forty years.

II. And be it further enacted, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any water-course, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Claims to the use of light enjoyed for twenty years.

III. And be it further enacted, that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent

or agreement expressly made or given for that purpose by deed or writing.

IV. And be it further enacted, that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this Statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made.

Before-mentioned periods to be deemed those next before suits.

V. And be it further enacted, that in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall

In actions on the case the claimant may allege his right generally, as at Present.

In pleas to trespass and certain other pleadings, the period mentioned in this Act may be alleged.

Exceptions, &c. to be replied to specially.

not be received in evidence on any general traverse or denial of such allegation.

Presumption
not to be al-
lowed in claims
herein provi-
ded for.

VI. And be it further enacted, that in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim.

Proviso for in-
fants, &c.

VII. Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

What time to
be excluded in
computing the
term of forty
years appoint-
ed by this Act.

VIII. Provided always, and be it further enacted, that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

Limitation.

IX. And be it further enacted, that this Act shall not extend to Scotland or Ireland.

Commence-
ment of Act.

X. And be it further enacted, that this Act shall commence and take effect on the first day of Michaelmas Term now next ensuing.

XI. And be it further enacted, that this Act may be amended, altered, or repealed during this present Session of Parliament. Act may be amended.

APPENDIX VI.

THE SPECIFIC RELIEF ACT, 1877,

(ACT I OF 1877,)

As modified by subsequent legislation.

PART III.

Of Preventive Relief.

CHAPTER IX.

OF INJUNCTIONS GENERALLY.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual. Preventive relief how granted.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.⁽¹⁾ Temporary injunctions.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff. Perpetual injunctions.

(1) This reference should now be read as applying to Act XIV of 1882—see s. 3 of that Act.

CHAPTER X.

OF PERPETUAL INJUNCTIONS.

Perpetual
injunctions
when
granted.

54. Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely);—

- (a) where the defendant is trustee of the property for the plaintiff;
- (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
- (c) where the invasion is such that pecuniary compensation would not afford adequate relief;
- (d) where it is probable that pecuniary compensation cannot be got for the invasion;
- (e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

EXPLANATION.—For the purpose of this section a trademark is property.

Illustrations.

(a) A lets certain land to B, and B contracts not to dig sand or gravel thereout. A may sue for an injunction to restrain B from digging in violation of his contract.

(b) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach.

(c) The Directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

(d) The Directors of a fire and life-insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(e) A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(f) A, a trustee for B, is about to make an imprudent sale of a small part of the trust-property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(g) A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children. A then contracts to sell the estate to C. B or any of his children may sue for an injunction to restrain the sale.

(h) In the course of A's employment as a vakil, certain papers belonging to his client, B, come into his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.

(i) A is B's medical adviser. He demands money of B which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing.

(j) A, the owner of two adjoining houses, lets one to B and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing.

(k) A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husband-like manner.

(l) A, B and C are partners, the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership-property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act.

(m) A, a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her.

(n) A, B and C are members of an undivided Hindu family. A cuts

timber growing on the family-property, and threatens to destroy part of the family-house and to sell some of the family-utensils. B and C may sue for an injunction to restrain him.

(o) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the Official Assignee and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

(p) The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.

(q) A, in an administration-suit to which a creditor, B, is not a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debt. A may sue for an injunction to restrain B.

(r) A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's mine and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.

(s) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for an injunction restraining A from making the noise.

(t) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.

(u) A infringes B's patent. If the Court is satisfied that the patent is valid and has been infringed, B may obtain an injunction to restrain the infringement.

(v) A pirates B's copyright. B may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(w) A improperly uses the trademark of B. B may obtain an injunction to restrain the user, provided that B's use of the trademark is honest.

(x) A, a tradesman, holds out B as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing.

(y) A, a very eminent man, writes letters on family-topics to B. After the death of A and B, C, who is B's residuary legatee, proposes to make money by publishing A's letters. D, who is A's executor, has

a property in the letters, and may sue for an injunction to restrain C from publishing them.

(2) A carries on a manufactory and B is his assistant. In the course of his business, A imparts to B a secret process of value. B afterwards demands money of A, threatening, in case of refusal, to disclose the process to C, a rival manufacturer. A may sue for an injunction to restrain B from disclosing the process.

55. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Mandatory
injunctions.

Illustrations.

(a) A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act, 1877,⁽¹⁾ Part IV. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights.

(b) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.

(c) In the case put as illustration (i) to section 54, the Court may also order all written communications made by B, as patient, to A, as medical adviser, to be destroyed.

(d) In the case put as illustration (v) to section 54, the Court may also order A's letters to be destroyed.

(e) A threatens to publish statements concerning B which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.

(f) A, being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication.

(g) In the cases put as illustrations (v) and (w) to section 54, and as illustrations (e) and (f) to this section, the Court may also order the copies produced by piracy, and the trademarks, statements and communications, therein respectively mentioned, to be given up or destroyed.

(1) The reference to Act IX of 1871 is altered in accordance with Act XV of 1877, s. 2.—

Injunction
when
refused.

56. An injunction cannot be granted—

- (a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings ;
- (b) to stay proceedings in a Court not subordinate to that from which the injunction is sought ;
- (c) to restrain persons from applying to any legislative body ;
- (d) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government ;
- (e) to stay proceedings in any criminal matter ;
- (f) to prevent the breach of a contract the performance of which would not be specifically enforced ;
- (g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance ;
- (h) to prevent a continuing breach in which the applicant has acquiesced ;
- (i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust ;
- (j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court ;
- (k) where the applicant has no personal interest in the matter.

Illustrations.

(a) A seeks an injunction to restrain his partner, B, from receiving the partnership-debts and effects. It appears that A had improperly possessed himself of the books of the firm and refused B access to them. The Court will refuse the injunction.

(b) A manufactures and sells crucibles, designating them as "patent plumbago crucibles," though, in fact, they have never been patented,

B pirates the designation. A cannot obtain an injunction to restrain the piracy.

(c) A sells an article called "Mexican Balm," stating that it is compounded of divers rare essences, and has sovereign medicinal qualities. B commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying A's Mexican Balm. A sues B for an injunction to restrain the sale. B shows that A's Mexican Balm consists of nothing but scented hog's lard. A's use of his description is not an honest one and he cannot obtain an injunction.

57. Notwithstanding section 56, clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement: provided that the applicant has not failed to perform the contract so far as it is binding on him.

Injunction to perform negative agreement.

Illustrations.

(a) A contracts to sell to B for Rs. 1,000 the good-will of a certain business unconnected with business-premises, and further agrees not to carry on that business in Calcutta. B pays A the Rs. 1,000 but A carries on the business in Calcutta. The Court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta.

(b) A contracts to sell to B the good-will of a business. A then sets up a similar business close by B's shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and B may obtain an injunction to restrain A from soliciting the customers, and from doing any act whereby their good-will may be withdrawn from B.

(c) A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.

(d) B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk.

(e) A contracts with B that, in consideration of Rs. 1,000 to be paid

to him by B on a day fixed, he will not set up a certain business within a specified distance. B fails to pay the money. A cannot be restrained from carrying on the business within the specified distance.

APPENDIX VII.

THE CRIMINAL PROCEDURE CODE, 1898.⁽¹⁾

(ACT No. V OF 1898),

SECTION 147.

Disputes concerning easements, &c.

147. Whenever any such Magistrate⁽²⁾ is satisfied as aforesaid⁽³⁾ that a dispute likely to cause a breach of the peace exists concerning the right of use of any land or water (including any right of way or other easement over the same) within the local limits of his jurisdiction, he may inquire into the matter in manner provided by Section 145; and may, if it appears to him that such right exists, make an order permitting such thing to be done, or directing that such thing shall not be done, as the case may be, until the person objecting to such thing being done, or claiming that such thing may be done, obtains the decision of a competent Court adjudging him to be entitled to prevent the doing of, or to do, such thing, as the case may be:

Provided that no order shall be passed under this section permitting the doing of anything where the right to do such thing is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry; or, where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or occasions before such institution.

The expression "tangible immoveable property" in Sections 145 and 147 of the Code of 1882 is replaced by the words "land or water" in

(1) Comes into force on the first day of July 1898 (See Sec. 1).

(2) A District Magistrate, Sub-divisional Magistrate or Magistrate of the first class: see s. 145.

(3) from a police report or other information: see s. 145.

the corresponding Sections 145 and 147 of the new Code of 1898 and S. 145 of the new Code contains this definition of the words "land or water":—

"For the purposes of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property."

The corresponding section of the Criminal Procedure Code of 1882 is as follows:—

147. Whenever any such Magistrate is satisfied as aforesaid that a dispute likely to cause a breach of the peace exists concerning the right to do or prevent the doing of anything in or upon any tangible immoveable property⁽¹⁾ situate within the local limits of his jurisdiction, he may inquire into the matter; and may, if it appears to him that such right exists, make an order permitting such thing to be done, or directing that such thing shall not be done, as the case may be, until the person objecting to such thing being done or claiming that such thing may be done, obtains the decision of a competent Civil Court adjudging him to be entitled to prevent the doing of, or to do, such thing, as the case may be:⁽²⁾

Disputes concerning easements, &c.

Provided that no order shall be passed under this section permitting the doing of anything where the right to do such thing is exerciseable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry; or, where the right is exerciseable only at particular seasons, unless the right has been exercised during the season next before such institution.

(1) These words were held to include a right of fishing and taking fish, and any other profit à prendre: *Dukhi Mullah v. Halway*, I. L. R., 23 Cal. 55; *Kali Kissen Tagore v. Anund Chunder Roy*, I. L. R., 23 Cal. 557.

(2) *Bathoo Lal v. Domi Lal*, I. L. R., 21 Cal. 727.

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